TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 293

JAYBIRD MINING COMPANY, PLAINTIFF IN ERROR,

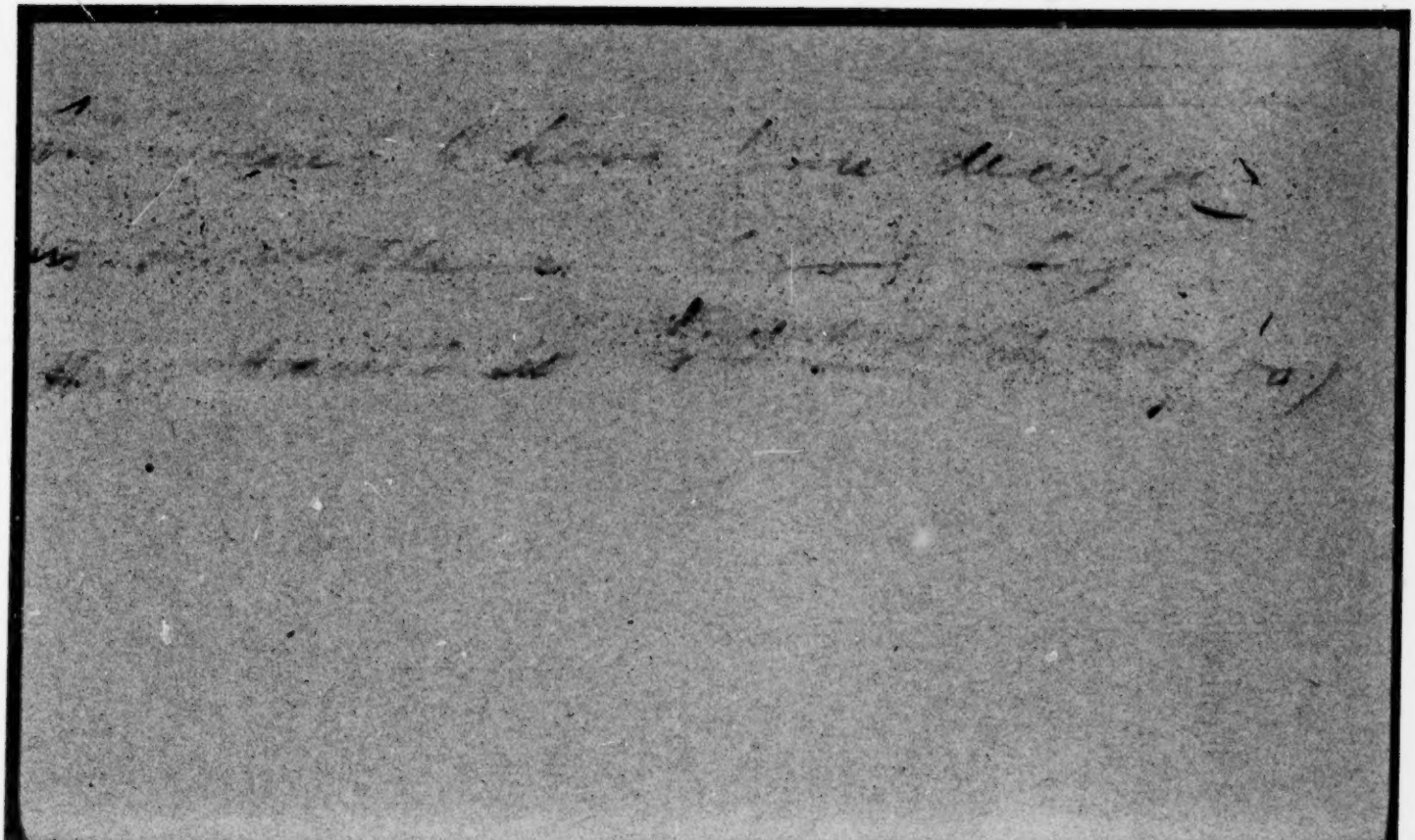
vs.

JOE WEIR, AS COUNTY TREASURER OF OTTAWA COUNTY, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED FEBRUARY 24, 1926.

(30,894)



(30,894)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 929

JAYBIRD MINING COMPANY, PLAINTIFF IN ERROR,

vs.

JOE WEIR, AS COUNTY TREASURER OF OTTAWA COUNTY, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1925

[fol. a] **IN SUPREME COURT OF OKLAHOMA**

RETURN TO WRIT OF ERROR

In obedience to the commands of the with- Writ I herewith transmit a full, true and complete transcript of the record and all proceedings in the within entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 15th day of January, 1925.

William M. Franklin, Clerk Supreme Court Oklahoma, by Jessie Pardoe, Deputy. (Seal Supreme Court, State of Oklahoma.)

[fol. 1] CITATION—In usual form, showing service on J. H. Venable; filed January 15, 1925; omitted in printing

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[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

JAYBIRD MINING COMPANY, a Corporation, Plaintiff in Error,

vs.

JOE WEIR, County Treasurer of Ottawa County, Oklahoma, Defendant in Error

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed January 9, 1925

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and Associate Justices of said Court:

Now comes Jaybird Mining Company, a corporation, plaintiff in error herein, and would show unto this Honorable Court that in the record and proceedings, and rendition of the judgment in the above cause by the Supreme Court of the State of Oklahoma on December 9, 1924, it being the highest court of said State in which a decision could be had on the said suit between the parties above named, manifest error has occurred, greatly to its damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of a statute, treaty and authority exercised under the United States, and the decision was against their validity, and there was drawn in question the validity of a statute

of the State of Oklahoma and authority exercised thereunder repugnant to the Constitution, a treaty, and law of the United States, and the decision was in favor of their validity, and there was drawn in question the construction of the Constitution of the United States, a treaty with the Quapaw Indians, and a statute of the United States, and the decision was against the right, title, privilege and exemption specially set up or claimed thereunder by this plaintiff in error. The particular questions involved were: The right of plaintiff in [fol. 3] error to an exemption from tax by the State of Oklahoma on its lead and zinc ores in gross and in the bin, produced under and pursuant to the terms of a mining lease held by it and executed by the Honorable Secretary of the Interior upon the allotment of a Quapaw Indian allotted under the Act of Congress approved March 2, 1895 (28 Stats. p. 907), and leased pursuant to the authority of the Act of Congress approved June 7, 1897 (30 Stats., p. 72); all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that his appeal be allowed, writ of error issue, and that a transcript of the record, proceedings and papers upon which said orders and decrees were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

Jaybird Mining Co., Petitioner and Plaintiff in Error, by A. Scott Thompson, Its Attorney.

Order

The above petition is granted, the writ of error shall issue as prayed for upon the plaintiff in error giving bond conditioned as the law directs, in the sum of $2,000.00, which when approved shall operate as a supersedeas and stay of mandate, and that a true copy of the record, assignment of errors, and all proceedings had in the case in the Supreme Court of Oklahoma, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that [fol. 4] the said Court may inspect the same and do what according to law should be done.

Dated this 9th day of January, 1925.

N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma. (Seal Supreme Court, State of Oklahoma.)

Attest: Wm. M. Franklin, Clerk Supreme Court of the State of Oklahoma, by Jessie Pardoe, Deputy.

[fol. 5] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 9, 1925

Comes now Jaybird Mining Company, a corporation, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of judgment of the Supreme Court of the State of Oklahoma, and in the opinion filed therein in said cause, manifest errors were committed to its prejudice, which are apparent in the record therein; that the errors committed by the Supreme Court of the State of Oklahoma in the opinion and judgment therein, in said cause, are more fully and particularly set forth as follows:

I

The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Ottawa County, Oklahoma, and directing that judgment should be entered by said District Court in favor of the defendant in error herein.

II

The Supreme Court of the State of Oklahoma erred in refusing to affirm the decision of the District Court of Ottawa County, Oklahoma.

III

The Supreme Court of Oklahoma erred in holding, deciding and determining the statute of the State of Oklahoma approved February [fol. 6] 14, 1916, and being Chapter 39 of Session Laws of the State of Oklahoma, extra session, page 102, imposing gross production taxes, are valid, and rendering a decision in favor of its validity, and in not holding it repugnant to the Constitution, treaties and laws of the United States.

IV

The Supreme Court of Oklahoma erred in holding, deciding and determining that the acts of the Treasurer of Ottawa County, Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by the statute mentioned in Specification or Assignment of Error No. 3 preceding, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax, are and were valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, treaties and laws of the United States.

V

The Supreme Court of Oklahoma erred in sustaining the validity of the gross production tax law above specified and the statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on lead and zinc ores in the bin on January 1 of the current year, upon such ores unsold of the plaintiff in error herein, derived and produced solely from lead and zinc mining leases upon restricted Indian lands under the control of Congress and the Secretary of the Interior.

VI

The Supreme Court of Oklahoma erred in reversing the judgment or decree of the District Court of Ottawa County, Oklahoma, and in holding and denying that plaintiff in error was exempt from ad valorem tax upon the property so charged, claimed by the plaintiff in error under the Constitution, treaties and laws of the United States.

[fol. 7] For which errors the said Jaybird Mining Company, plaintiff in error, prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, and that the Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Ottawa County, Oklahoma, as rendered; and for such other and further relief as to the Court may seem just and proper, and for its costs.

A. Scott Thompson, Attorney for Plaintiff in Error.

[fol. 8] [File endorsement omitted]

In Supreme Court of Oklahoma

[Title omitted]

Writ of Error—Filed January 9, 1925

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court before you or similar to you, between Jaybird Mining Company, a corporation, plaintiff in error, and Joe Weir, as County Treasurer of Ottawa County, Oklahoma, defendant in error, your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question the validity of a statute, treaty and authority exercised under the United States, and the decision was against their validity, and there was drawn in question the validity of a statute of the State of Oklahoma and authority exercised thereunder repug-

nant to the Constitution, a treaty, and law of the United States, and the decision was in favor of their validity, and there was drawn in question the construction of the Constitution of the United States, a treaty with the Quapaw Indians, and a statute of the United States, and the decision was against the right, title, privilege and exemption specially set up or claimed thereunder by the plaintiff in error. The particular questions involved were: The right of plaintiff in error to an exemption from tax by the State of Oklahoma on its lead and zinc ores in gross and in the bin, produced under and pursuant to [fol. 9] the terms of a mining lease held by it and executed by the Honorable Secretary of the Interior upon the allotment of a Quapaw Indian, allotted under the Act of Congress approved March 2, 1895 (28 Stats. p. 907); and leased pursuant to the authority of the Act of Congress approved June 7, 1897 (30 Stats., p. 72), and there being manifest error in said decision, greatly to the damage of the Jaybird Mining Company, plaintiff in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have same at Washington on the 9th day of February, A. D. 1925, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court, the 9th day of January, year of our Lord 1925.

Harry L. Finley, Clerk United States District Court for the Western District of Oklahoma. (Seal of the Supreme Court, Western District of Oklahoma.)

Approved and allowed by the Honorable N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma, this 9th day of January, 1925.

N. E. McNeill, Chief Justice Supreme Court of Oklahoma.

Attest: Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, by Jessie Pardoe, Deputy. (Seal of Supreme Court, State of Oklahoma.)

[fols. 10 & 11] Bond on Writ of Error for $2,000—Approved and filed January 9, 1925; omitted in printing

[fol. 12] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 9, 1925

To the Clerk of the Supreme Court of Oklahoma:

You are hereby requested to at once prepare transcript for the United States Supreme Court in the above entitled cause, being Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in error, vs. Jaybird Mining Company, a corporation, Defendant in Error, No. 14,059 in your *couer*. In the preparation of this transcript you will insert the following:

1. Petition for writ of error.
2. Assignments of error presented therewith.
3. Order allowing the writ and fixing bond.
4. Bond of plaintiff in error, showing approval.
5. Writ of error issued.
6. Citation to defendant in error, and return thereof.
7. Copy of case made and transcript filed in the Supreme Court of Oklahoma.
8. Order showing filing of said case made and transcript.
9. Order of court submitting cause on briefs.
10. Opinion of the Supreme Court of Oklahoma filed October 21, 1924.
11. Order and judgment of Supreme Court of Oklahoma.
12. Order filing petition for rehearing herein by plaintiff in error.

[fols. 13 & 14] 13. The order overruling and denying petition for rehearing, showing the date of filing thereof.

14. Order staying mandate, showing filing thereof.
15. Petition for rehearing.
16. All minutes of the Clerk and all orders made and entered in said cause in the Supreme Court of Oklahoma.
17. Copy of this præcipe.

Jaybird Mining Company, by A. Scott Thompson, Its Attorney.

[fol. 15] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed January 10, 1923

The said Joe Weir, as County Treasurer of Ottawa County, Oklahoma, plaintiff in error, complains of the said Jaybird Mining Com-

pany, a corporation, defendant in error for that the said defendant in error at the May, 1922, term of the District Court of Ottawa County, State of Oklahoma, recovered a judgment, by the consideration of said court against the said Joe Weir, County Treasurer of Ottawa County Oklahoma, in a certain action then pending in the said court, wherein the said Jaybird Mining Company, a corporation was plaintiff, and the said Joe Weir, County Treasurer of Ottawa County Oklahoma was defendant. A certified transcript of the record of said court is hereunto attached, marked "Exhibit A," and made a part of this petition in error; and the said Joe Weir, County Treasurer of Ottawa County, Oklahoma, avers that there is error in said record and proceedings, in this to-wit:

(1) That said court erred in overruling the demurrer of the defendant, to the petition of the plaintiff.

(2) That said court erred in not rendering judgment for the plaintiff in error, and in failing to sustain the demurrer to the petition.

(3) The said court erred in rendering judgment against the plaintiff in error, and for the defendant in error.

[fols. 16 & 17] Wherefore the plaintiff in error prays, that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and against the defendant in error, and that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment, and for such other and further relief as the court may deem just.

Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in Error, by A. L. Commons, County Attorney of Ottawa County, Oklahoma, and John H. Veneable, Assistant County Atty., Miami.

STATE OF OKLAHOMA,
County of Ottawa, ss:

DISTRICT COURT

This instrument was filed for record Jan. 5, 1923.
Geo. M. Henderson, Court Clerk, by Ethel McGrew, Deputy.

[fol. 18] IN DISTRICT COURT OF OTTAWA COUNTY

No. —

JAYBIRD MINING COMPANY, a Corporation, Plaintiff

vs.

JOE WEIR, County Treasurer of Ottawa County, Oklahoma, Defendant

PETITION—Filed January 28, 1922

Comes now the plaintiff and states:

1. That it is a corporation organized and existing under the laws of the State of Oklahoma and engaged in the mining of lead and zinc ores in Ottawa County, Oklahoma. That the defendant is and was at all times mentioned herein the duly elected, qualified and acting County Treasurer of Ottawa County, State of Oklahoma, and was the collecting officer for taxes of said County for the year 1921.

2. That the Congress of the United States on March 2, 1895 (28 Stat. page 907) enacted the following statute:

Be it enacted, etc., That the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allotees in accordance therewith: Pro-[fol. 19] vided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

That pursuant to authority granted in said act the said Secretary of the Interior caused a patent to be issued to Humbahwattah Quapaw, a member of the Quapaw tribe of Indians, for an allotment of land, a portion of said land so patented being the Southwest Quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East of the Indian Meridian in said County and state, and that said patent contained restrictions against alienation for the period of twenty five years from the date thereof, the 26 day of September, 1896. That the restrictions against alienation on said lands were further extended by Act of Congress dated March 3, 1921, for an additional period of 25 years thereafter.

That the Congress of the United States, on June 7, 1897 (30 Stats. page 72) enacted the following statute:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands

or any part thereof for a term not exceeding three years for farming or grrazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

That the Quapaw Indians were within the limits and jurisdiction [fol. 20] of the Quapaw Agency and came within the provisions of the last mentioned leasing statute, and that the lands above described have been at all times and now are subject to the restrictions and limitations imposed in said act of Congress and patent issued therefor and are now owned by the lawful heirs of said allottee.

3. That this plaintiff is now and has been for several years last past operating a lead and zinc mine upon the above described property, and did have in its ore bins on January 1, 1921, a quantity of lead and zinc ores mined during the year 1920. That this plaintiff mined said ore pursuant to its right obtained under a mining lease executed under the terms of the leasing statute above named, and approved by the Secretary of the Interior pursuant to said leasing statute above mentioned. That the said allottee and her heirs have been at all times and now are wards of the United States Government, and that pursuant to the authority granted in the said leasing statute and carrying out the policy of the United States Government, the Secretary of the Interior had, prior to the production of said minerals, declared said Indian land-owners to be incapable of managing their allotment with benefit to themselves, and assumed control and management of the mining of said lands for and on behalf of said Indian owners, and that since said Secretary of the [fol. 21] Interior has assumed said control all royalties accruing on ores mined from said land have been paid direct to the said Secretary of the Interior.

That Congress by such leasing statute expressed the policy of the Federal Government of leasing Quapaw lands and securing the development of minerals thereunder for the benefit of the Indian owners and at all times retained control thereof in the Secretary of the Interior. That in carrying out the terms of the mining lease executed on the above described lands this plaintiff is complying with and carrying out the terms of a Federal agency as expressed in said leasing statute and the policy of the Government in protecting and developing the mineral lands of its Indian wards.

That on January 1, 1921, the ores in the bin on said lands were in mass, the royalty or equitable interest of the Indian not having been segregated or paid, the terms of the lease providing for payment of a royalty or percentage of the gross proceeds derived from the sale thereof.

4. That this plaintiff has paid to the Auditor of the State of Oklahoma, pursuant to Chapter 39 of the Session Laws of 1916 of the State of Oklahoma, a gross production tax on the ores so assessed when sold, and during the tax year in which same was produced and prior to June 30, 1921, and that the State of Oklahoma or the taxing officials of Ottawa County have no constitutional authority [fol. 22] to assess the same ore again on an ad Valorem basis.

5. That the taxing officials of Ottawa County in the State of Oklahoma, for the year 1921, without notice to or knowledge of the Plaintiff, wrongfully and unlawfully, and without authority, caused the ores in the bins of this plaintiff on said land on January 1, 1921, to be assessed an ad valorem tax in the amount of $2,319.80. That said levy and assessment and tax is in its entirety void, illegal and unauthorized for the reasons set forth above.

6. That this plaintiff, did, on the 31st day of December, 1921, pay to defendant, Joe Weir, as County Treasurer of Ottawa County, Oklahoma, the sum of $1,159.90, being one half of the total amount of taxes assessed to this plaintiff against the ores hereinbefore mentioned and described, and that said sum of money in its entirety was paid as aforesaid and under protest for the reasons hereinbefore set out. That at the time of said payment this plaintiff delivered to the defendant its protest in writing, a copy of which protest is hereto attached, marked Exhibit "A," and made a part hereof. That such taxes were not paid voluntarily, but under protest and compulsion, and said defendant was notified not to disburse said sums and that suit would be brought for the recovery thereof.

7. The plaintiff further states that said taxing officials are without authority of law to make said assesment and that said ores are [fol. 23] free from tax because of the facts as plead above.

Wherefore, premises considered, plaintiff prays judgment of this court in its favor and against the said defendant in the sum of $1,159.90 with interest thereon and costs of this action.

A. Scott Thompson, Attorney for Plaintiff.

[fol. 24] EXHIBIT "A" TO PETITION

To Joe Weir, County Treasurer of Ottawa County, in the State of Oklahoma:

Herewith is delivered to you the sum of $1,159.90 to cover one-half ad valorem tax on lead and zinc ores assessed as on hand on January 1, 1921, and produced from the following described land in Ottawa County, Oklahoma, to wit:

The Southwest Quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East,

which said payment of tax as aforesaid is made under protest for the reason that said ores so attempted to be assessed and upon which the aforementioned tax is based and sought to be collected by our office was produced on the lands hereinbefore described, which said land was patented to Hum-bah-wa-tah Quapaw, a Quapaw Indian, under Act of Congress approved March 2, 1895, said patent containing restrictions against alienation for a period of twenty-five years from the date thereof, to wit, the — day of September, 1895; that said lands were leased for mining purposes under Act of Congress approved June 7, 1897; that the ores so attempted to be assessed and upon which the tax herewith paid was levied and is now sought to be collected by your office, had not been severed as between the lessee and lessor, and that no payment of royalty had been made on said ore at said time of assessment; that at the time of said at-[fol. 25] tempted assessment this protestant, lessee under said lease of the herein described lands, was a federal agency, and that said ores so attempted to be taxed were not subject to tax under any taxing laws of the State of Oklahoma; that said lands are still held and owned by the allottee or his heirs, and restrictions against alienation have not been removed, but have in fact been extended by act of Congress, and said land is non-taxable for any purpose, and the product therefrom is not subject to tax for the reasons stated above; that the Secretary of the Interior under said acts of Congress has reserved the right unto himself to control and supervise all such mining leases on said lands, and said Secretary is in fact in control of and receiving the royalties on ores produced on said lands for and on behalf of said Indian owners; that the tax sought to be levied and collected by Ottawa County and the State of Oklahoma is an attempt upon the part of said county and state to lay a burden or tax on a federal agency and is unlawful and unauthorized.

That this protestant has paid or will pay to the State Auditor of the State of Oklahoma a gross production tax as provided by the statutes of the State of Oklahoma on said ores during the tax year in which same was produced, and said ad valorem tax is for such reason unauthorized and without authority of law.

[fol. 26] You are therefore requested not to disburse any part of said tax paid herewith and are advised that suit will be brought against you as such County Treasurer for the recovery of tax paid herewith, in the time and manner provided by the statutes of the State of Oklahoma relating thereto.

Jaybird Mining Co., by R. J. Tuthill, Auditor.

Received payment of the tax mentioned in the herewith attached protest and at the same time received a true and correct copy of the hereto attached protest.

—— ——, County Treasurer of Ottawa County, Oklahoma.

[File endorsement omitted.]

[fol. 27] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

PRÆCIPE FOR SUMMONS—Filed January 28, 1922

To the Clerk of said Court:

Please issue summons in above entitled action, and direct same to Sheriff of Ottawa County, State of Oklahoma, to serve in his County, on Joe Weir as Treasurer of Ottawa County, Oklahoma, the defendant in said action.

Make summons returnable the 4th day of February, 1922.

Make answer day on or before the 25th of February, 1922.

Endorse thereon, action brought for money judgment.

Amount sued for $1,159.90 and interest thereon at 6 per cent from the 31st day of Dec. 1921.

Dated this 28th day of January, 1922. Attorney Fee —.

A. Scott Thompson, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 28] IN DISTRICT COURT OF OTTAWA COUNTY

OTTAWA COUNTY:

[Title omitted]

SUMMONS AND SHERIFF'S RETURN—Filed January 30, 1922

To the Sheriff of Ottawa County, Greeting:

You are hereby commanded to notify Joe Weir as County Treasurer of Ottawa County, Oklahoma, that he has been sued by Jaybird Mining Company in the District Court of Ottawa County, Oklahoma, and that he must answer the petition of said Jaybird Mining Company filed against him in said Court, in the City of Miami, in said County on or before the 25th day of February, 1922, or said petition will be taken as true and judgment rendered accordingly.

Your will make return of this summons on or before the 4th day of February, 1922.

Given under my hand and the seal of said Court, this 28th day of January, 1922.

Geo. M. Henderson, Court Clerk. J. W. Dewey, Deputy. (Seal.)

[fol. 29] Suit brought for money judgment. If defendant fail to answer, plaintiff will take judgment in the sum of $1,159.90 with interest at the rate of 6 per cent per annum from the 31st day of Dec. 1921 and cost of suit.

Geo. M. Henderson, Court Clerk, by J. W. Dewey, Deputy. (Seal.)

Received this writ Jan. 28, 1922 at 3 o'clock P. M. and served the same upon the following persons, defendants within named, at the times following, to wit: Joe Weir, as County Treasurer of Ottawa County, Okla., Jan. 28, 1922, by delivering to said defendant, personally in said county a true and certified copy of the within summons, with all the endorsements thereon.

Neil Harr, Sheriff, by N. C. Cox, Deputy.

Sheriff's Fees:

Service and return, first person	$.50
1 copy of summons	.25
Total	.75

[File endorsement omitted.]

[fol. 30] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

DEMURRER—Filed June 20, 1922

Comes now the above named defendant and demurs to plaintiff's petition in the within cause for the reason that it does not state facts sufficient to constitute a cause of action.

Louis N. Stivers, Attorney for Defendant.

[File endorsement omitted.]

[fol. 31] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

STIPULATION RE TAXES PAID UNDER PROTEST—Filed July 1, 1922

It is hereby stipulated and agreed by and between the plaintiff and the defendant as follows:

1. That since the institution of the above and foregoing suit to recover taxes paid under protest upon the first half — the 1921 taxes, which said plaintiff claims to be the produce of illegal levies, the last half of said taxes for said year 1921 have been paid by said plaintiff under protest on the 15th day of June, 1922; that upon such payment being made under protest a notice in writing was delivered to the defendant herein setting forth the reasons for the illegality of said levy of tax. A copy of such written protest is hereto attached, marked Exhibit "A", and made a part of this stipulation.

2. It is further stipulated and agreed by and between the plaintiff and defendant in this case that the plaintiff's cause of action con-[fol. 32] tained in the petition herein may be considered as amended so as to include plaintiff's claim to the last half of the taxes of said taxing jurisdiction for the year 1921 paid by said plaintiff and covered by the protest attached hereto, and that the amount prayed for in said petition filed herein shall be increased by the addition of the amount so paid, making the total amount of $2,319.80 as prayed for in the judgment herein, and that no separate action for the recovery thereof need be brought by plaintiff.

3. It is further stipulated and agreed by and between the parties hereto that said defendant and his successor or successors in office will hold said amounts so paid under protest, and in the event plaintiff is successful in this suit as to the first half of said taxes involved in the plaintiff's cause of action, or any part thereof, for the year of 1921, then the said defendant will pay to said plaintiff the amount of said illegal levies covered by the protest attached hereto or such sum or sums as may be finally adjudged by the court to be due said plaintiff.

This 30th day of June, 1921.

Jay Bird Mining Company, by A. Scott Thompson, Its Attorney. Joe Weir, County Treasurer of Ottawa County, Oklahoma, by O. F. Mason, County Attorney.

[fol. 33] EXHIBIT "A" TO STIPULATION

To Joe Weir, County Treasurer of Ottawa County, in the State of Oklahoma:

Herewith is delivered to you the sum of $1,159.90 to cover one half ad valorem tax on lead and zinc ores assesses as on hand on January 1, 1921, and produced from the following described land in Ottawa County, Oklahoma, to wit:

The Southwest quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East, which said payment of tax as aforesaid is made under protest for the reason that said ores so attempted to be assessed and upon which the aforementioned tax is based and sought to be collected by your office was produced on the lands hereinbefore described, which said lands were patened to Hum-pah-wat-tah Quapaw a Quapaw Indian, under Act of Congress approved March 2, 1895, said patent containing restrictions against alienation for a period of twenty-five years from the date thereof, to wit, the — day of September, 1896, that said lands were leased for mining purposes under Act of Congress approved June 7, 1897; that the ores so attempted to be assessed and upon which the tax herewith paid was levied and is now sought to be collected by your office had not been severed as between the lessee and lessor, and

that no payment of royalty had been made on said ore at said time of assessment; that at the time of said attempted assessment this protestant, lessee under said lease of the herein described lands, [fol. 34] was a federal agency, and that said ores so attempted to be taxed were not subject to tax under any taxing laws of the State of Oklahoma; that said lands are still held and owned by the allottee or his heirs, and restrictions against alienation have not been removed, but have in fact been extended by Act of Congress, and said land is non-taxable for any purpose, and the product therefrom is not subject to tax for the reason stated above; that the Secretary of the Interior under said acts of Congress has reserved the right unto himself to control and supervise all such mining leases on said lands, and said Secretary is in fact in control of and receiving the royalties on ores produced on said lands for and on behalf of said Indian owners; that the tax sought to be levied and collected by Ottawa County and the State of Oklahoma is an attempt upon the part of said county and state to lay a burden or tax on a federal agency and is unlawful and unauthorized.

That this protestant has paid or will pay to the State Auditor of the State of Oklahoma a gross production tax as provided by the statutes of the State of Oklahoma on said ores during the tax year in which same was produced, and said ad valorem tax is for such reason unauthorized and without authority of law.

You are therefore requested not to disburse any part of said tax paid herewith and are advised that suit will be brought against you [fol. 35] as such County Treasurer for the recovery of tax paid herewith, in the time and manner provided by the statutes of the State of Oklahoma relating thereto.

Jaybird Mining Company, by R. J. Tuthill.

Miami, Oklahoma, June 14th, 1922.

Received payment of the tax mentioned in the herewith attached protest and at the same time received a true and correct copy of the hereto attached protest.

Joe Weir, County Treasurer of Ottawa County, Oklahoma.

[File endorsement omitted.]

[fol. 36] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—July 8, 1922

Demurrer to petition heard and overruled. Defendant excepts. Defendant elects to stand on demurrer to petition and declines to plead further. Judgment in favor of Plaintiff and against defendant for amount sued for & costs. Defendant excepts. Defendant in

open court in presence of attorney for plaintiff gives notice of intention to appeal, same allowed, all as per journal entry, and further proceedings in the following cases to be stayed pending the decision of Supreme Court in No. 5113: (as per stipulations in each case).

[fol. 37] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

JUDGMENT—August 5, 1922

On this 8th day of July, 1922, the same being a day of the regular May 1922 term of this court, this cause coming on to be heard upon the demurrer to the petition filed herein, both parties in open court through their respective counsel. The demurrer was presented to the court, and the court having heard argument and being fully advised in the premises, does hereby overrule said demurrer, and the defendant excepts to such ruling, and his exception is allowed. That thereupon the defendant in open court elected to stand upon his demurrer, and the court finds that the plaintiff is entitled to the relief prayed for in said petition, to wit, a judgment against said defendant in the sum of $2,357.60 and 6% interest thereon from date, and for its costs herein expended.

It is therefore the order and judgment of the court that the plain-[fol. 38] tiff be and is hereby granted judgment against the defendant in the sum of $2,357.60 and 6 per cent interest thereon per annum from the date hereof, and for its costs herein expended, taxed at $—. To such judgment the defendant is excepting, and his exception is allowed. The defendant thereupon gives notice in open court in the presence of counsel for the plaintiff of his intention to appeal said cause to the Supreme Court of the State of Oklahoma, and requests that the court direct the Clerk of this court to make an entry of such notice on his journal in this cause, and further requests this court for good cause shown to be given an additional time in which to make and serve transcript of the record herein, and the court for good cause shown grants the additional time of — days from and after this date in which to make and serve transcript of record herein upon counsel for the plaintiff, the plaintiff to have — days after service of said transcript in which to make suggestions of amendment, and same to be settled upon five days' notice by either party.

And the court does further order, adjudge and decree that the defendant herein be and he is hereby authorized and directed to pay to said plaintiff the sum of $2,357.60 sued for herein, together with 6 per cent interest thereon from date hereof, and the costs of this suit, [fol. 39] and the defendant excepts to such order and direction and such exception is allowed.

S. C. Fullerton, District Judge.

OK. Louis N. Stivers.

[File endorsement omitted.]

[fol. 40] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—July 8, 1922

Demurrer to Petition heard and overruled, defendant excepts. Defendant elects to stand on demurrer to petition and declines to plead further. Judgment in favor of Plaintiff and vs. Defendant for amount sued for & costs. Defendant excepts. Defendant in open court in presence of attorney for Plaintiff gives notice of intention to appeal to Supreme Court of State and prays an appeal. Same allowed. All as per Journal Entry.

[fol. 41] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

CLERK'S CERTIFICATE

I, Geo. M. Henderson, Court Clerk for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In Witness Whereof, I have hereunto set my hand and the seal of this court, this 30th day of December, 1922.

Geo. M. Henderson, Court Clerk, by J. W. Dewey, Deputy.
(Seal.)

[fol. 42] [File endorsement omitted.]

[fol. 43] IN SUPREME COURT OF OKLAHOMA

#14059

J. WEIR, ETC.,

vs.

JAYBIRD MINING COMPANY

SUBMISSION OF CAUSE—May 13, 1924

And now on this 13th day of May, 1924, the above cause is submitted on record and briefs filed herein.

[fol. 44] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—October 21, 1924

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Pinkham, Com'r.

[fol. 45] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed October 21, 1924

Syllabus

1. The state has no power to levy an occupation tax upon the agency of the government nor to levy an income tax on the proceeds thereof, but the state has the power and authority to levy a property tax upon the private property of the agent when such property has a situs within the state.

2. Where lead and zinc ores extracted from the lands of restricted Quapaw Indians are stored in the bins of the lessee and assessed for taxation on the day fixed by the laws of the state, such ores, being personalty and private property of the lessee, are not exempt from ad valorem taxation.

3. The tax imposed by section 9814, C. S. 1921, is not upon a federal agency nor upon the right to exercise or operate a federal agency but is upon the lessee's individual private property.

Error from the District Court of Ottawa County, Oklahoma

Hon S. C. Fullerton, Judge

Action by the Jaybird Mining Company against Joe Weir, County Treasurer of Ottawa County, Oklahoma. From judgment in favor of plaintiff, defendant brings error. Reversed.

Reversed.

Clifford W. King, Leon S. Hirsh, for the State.

A. L. Commons, John H. Venable, Attorneys for Plaintiff in Error.

A. Scott Thompson, Attorney for Defendant in Error.

[fol. 46] OPINION BY PINKHAM, C.

This is an appeal from a judgment of the district court of Ottawa County, Oklahoma, in a cause wherein the Jaybird Mining Company, a corporation, was plaintiff, and the plaintiff in error, Joe Weir, County Treasurer of Ottawa County, Oklahoma, was defendant.

The Jaybird Mining Company (hereinafter called "the company") was the lessee of certain lands allotted to one Hum-bah-wat-tah Quapaw, a restricted Quapaw Indian; and, by virtue of said lease, had operated a lead and zinc mine upon said lands. The company paid to the State Auditor a gross production tax on ores produced and sold prior to June 30, 1921, but on January 1, 1921, had ores on hand, unsold, in mass, and the royalty interest of the Indian unsegregated, upon which the plaintiff in error (hereinafter called "county treasurer") assessed an ad valorem tax in the amount of $2,319.80. This tax was paid, under protest, by the company and suit was instituted to recover same by virtue of the laws of the State of Oklahoma in such cases provided.

The company alleged, in its petition, that by the Act of Congress, of March 2, 1895 (28 Stat. 907), the lands, of which it was lessee, were patented to the Indian under a twenty-five-year restriction, and that, by Act of Congress of March 3, 1921, (41 Stat. 1225, 1248) the restrictions were further extended for an additional period of twenty-five-years. It was further all-ged that, by virtue of Act of Congress of June 7, 1897 (30 Stat. 72), the lands of Hum-bah-wat-tah Quapaw were leased to the company by direction and with the approval of the Secretary of the Interior, the owners of the lands (the allottee's heirs) having been declared incompetent and [fol. 47] incapable of managing said estate and the Secretary of the Interior maintaining control through the Quapaw Indian Agency at Miami, Oklahoma. Hence the company alleged that it was carrying out the terms of a Federal Agency in developing the mineral lands of the Indian wards of the Federal Government.

The petition then stated that on January 1, 1921, the ores in the bin on said lands were in mass, the royalty or equitable interest of the Indian not having been segregated or paid, the terms of the lease providing for payment of a royalty or percentage of the gross proceeds derived from the sale thereof. It alleged that the company had paid to the Auditor of the state of Oklahoma a gross production tax on the ores "so assessed when sold, and during the tax year in which same was produced and prior to June 30, 1921," but that the taxing officials of Ottawa County, Oklahoma, assessed the ores in the bins on January 1, 1921, for ad valorem taxation and that such taxing officials caused such ore to be assessed *ad* ad valorem tax in the amount of $2,319.80.

The company alleged that the taxing officials aforesaid were without authority of law to make such ad valorem assessment, that the tax had been paid under protest, and it prayed judgment for the recovery of such amounts so paid.

The county treasurer demurred to said petition, which demurrer, on hearing, was overruled. The county treasurer elected to stand on his demurrer, declined to plead further, and the court thereupon rendered judgment in favor of the company for the amount sued for and costs. From this judgment the county treasurer appeals to this Court.

The one important question to be determined in this appeal is whether the company being the lessee of restricted Indian land is entitled to recover from the county treasurer the taxes paid by it [fol. 48] under protest on the ores which it had extracted from the leased land during the year 1920 and had stored in its bins on the 1st day of January, 1921, by reason of the fact that the lands from which these ores were mined were restricted Quapaw Indian lands leased by and with the consent of the Secretary of the Interior.

It is the theory of the company that it was a federal agency and as such its personal property was non-taxable by the state except as permitted by Act of Congress.

It is the theory of the county treasurer that the status of the company, the lessee of a restricted Indian, cannot be considered as that of such type of a federal instrumentality as to exempt such lessee's personal property from state taxation.

In the briefs of both parties numerous cases decided by this court and by the Supreme Court of the United States are cited in support of the conflicting propositions and in some instances the same cases are relied upon by both the company and the county treasurer.

If the company, operating under a departmental lease, is exempt from taxation upon its personal property—the ores in question, which it is admitted had been severed from the soil and stored in the bins of the company and were in its exclusive control and possession on the day fixed by law for the assessment of property for taxes—it must be by virtue of some statute, state or federal.

All property in this state, whether real or personal, except such as is exempt, shall be subject to taxation. Section 9574, C. S. 1921. Section 9575, C. S. 1921, enumerates the property that shall be exempt from taxation, but ore in bins is not included therein.

Section 9814, C. S. 1921, provides among other things that "oil in storage, asphalt, and ores bearing the minerals hereinbefore [fol. 49] named, mined, produced, and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time * * *."

Under no statute of this state was the property involved in this case exempt from taxation.

By the Act of June 7, 1897 (30 Stat. L. 72) it is provided that "the allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands or any part

thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining or business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers, and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability of any such allottee he cannot improve or manage his allottment properly and with benefit to himself the same may be leased in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him."

The lands in question were leased by the Secretary of the Interior to the company under the second proviso of the Act.

Whatever the terms of the company's lease under the provisions of the Act it seems to us clear that it does not either expressly or by necessary implication exempt from taxation the personal property of Quapaw Indians or personal property of the lessee consisting of minerals severed from the land.

The power to tax is an attribute of sovereignty so vital to the [fol. 50] existence of the state that it may be exercised without restriction unless expressly prohibited. Moose v. Board Comrs., 172 N. C. 919, 90 S. E. 441.

In Gray v. Heath, 203 U. S. 146, 51 L. Ed. 130, it is said: "His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens and the rule of exemption for him must be the same as for other citizens; that is, no exemption exists by implication but must be clearly manifested."

In the case of In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919, 81 Okla. 134, 197 Pac. 495, the exact proposition raised by the company in the case at bar was decided adversely to its contention. In that case it was held that "the tax imposed by section 39 Sess. Laws (Extra Session) 1916 (Section 9814, C. S. 1921) is not upon said agency nor upon the right to exercise or operate a federal agency but is upon the lessee's individual private property."

In the case of Protest of Bendelari Gross Tax of 1919, 82 Okla. 97, 198 Pac. 606, this court held "No constitutional implications prohibit a state tax upon property of an agent of the government merely because it is the property of such agent."

Counsel for the company contend that the Supreme Court of the United States, in the case of State v. Gillespie, 257 U. S. 501, in effect denied the soundness of the ruling of the Skelton case and that no authority other than that case is required to sustain the company's proposition, which, as we understand it, is that the ores in question produced by the company on January 1, 1921, are exempt from any tax burden sought to be imposed by the state because the lease and lessee constitute a federal instrumentality determined by the national government as the means of carrying out its obligations to Quapaw Indians.

[fol. 51] It is, we think, sufficient to say that nothing said in the case relied upon detracts from the decision in the Skelton case with respect to the right of the state to impose an ad valorem tax upon personal property produced by a lessee of restricted Indian land

where such property is found within the state on the day fixed by law for the assessment of property.

What the Gillespie case decided was that the income accruing from property (the lease), which is exempt from taxation, may not be taxed by the state.

It is said in the opinion: "The only question in the case is whether he (the lessee) is liable to this kind of a tax". The kind of a tax involved in the Gillespie case was an income tax obviously distinct from an ad valorem tax on tangible private personal property.

To make it clear that the Gillespie case was limited solely to "incomes" it is said in the concluding part of the opinion: "Whether this property could be taxed in any other form or not it cannot be reached as profits or income from leases such as those before us."

The right of the state to impose taxes upon personal property having a situs within the state's limits, notwithstanding the fact that the title to the land from which minerals are taken was in the United States, was upheld in Forbes v. Gracey, 94 U. S. 762, in which case it was said by Mr. Justice Miller: "The moment this ore becomes detached from the soil in which it is imbedded it becomes personal property and the ownership is in the man whose labor capital and skill has discovered and developed the mine and extracted the ore or other mineral products. It is then free from any lien, claim, or title of the United States, and is rightly subject to taxation by the state as any other personal property."

[fol. 52] "Such in interest from early times has been held to be property distinct from the land itself; i. e. vendable, inheritable, and taxable." Elder v. Wood, 208 U. S. 226, 227.

In the case of Choctaw, etc., Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, it is said in the opinion: "But it is insisted that the statute rightly understood prescribes only an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth —which is permissible according to many opinions of this court." Thomson v. Pacific Ry. Co., 9 Wall. 479; Union Pacific Ry. Co. v. Peniston, 18 Wall. 5; Central Pacific Ry. Co. v. California, 162 U. S. 91; Thomas v. Gay, 169 Pac. 264.

In Union Pacific Ry. Co. v. Peniston, and Thomas v. Gay, supra, it was held that a state or territory might properly levy a tax upon private property used under federal authority on Indian reservations.

The taxes here involved were not imposed upon the business of the lessee or upon the royalty received by the Indian but upon the ore as personal property, which the company had extracted from the soil and had stored in its bins and as held in Thomas v. Gay, supra, "Such a tax is too remote to be regarded as an interference with the legislative power of Congress."

Such a tax, we think, could in no way hamper the federal government in carrying out its duties to the Indian ward.

So far as the proposition that the Indian had an unsegregated interest in the ores is concerned it is stated in the company's petition that the terms of the lease gave no royalty interest in the Indian prior to the sale of ores in question; that the lease provided that the Indian should receive a percentage of the gross proceeds of

[fol. 53] the sale of the ore. It will be seen, therefore, that the title to the ore in the bins was completely in the company and the company would be liable for the tax to the full value and no deduction would be properly made for the undetermined interest that would accrue to the Indian from the proceeds of the sale when made by the company. In other words, there was no attempt to tax the royalty interest of the Indian. The Indian would receive his royalty according to the allegation of the petition when the ores were sold by the company.

We conclude that the taxes here involved were not upon the lease or upon the occupation of the lessee company or upon its income derived from the lease but simply an ad valorem tax such as is imposed annually upon the property of all other citizens of the state pursuant to its laws and that the judgment of the trial court overruling the demurrer of plaintiff in error and rendering judgment in favor of the Jaybird Mining Co. in the sum of $2,357.60 should be reversed and the cause remanded with directions to enter judgment sustaining the demurrer of the county treasurer, plaintiff in error herein.

[fols. 54 & 55] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed November 6, 1924

Comes now Jaybird Mining Company, defendant in error, and respectively represents to the court that on October 21, 1924, an opinion was rendered by this Court in the above entitled and numbered cause reversing the judgment and ruling of the District Court of Ottawa County, Oklahoma, theretofore rendered in the above entitled cause, in said District Court, which ruling and judgment in said District Court was in favor of this defendant in error and against the above named plaintiff in error; and said judgment as rendered by this [fol. 56] Court directs the trial court to enter judgment sustaining the demurrer of plaintiff in error, theretofore overruled.

That the decision of this Court as contained in its opinion filed October 21, 1924, and referred to in the foregoing paragraphs hereof, overlooked questions decisive of the case and duly submitted by counsel as follows:

First. The taxing power of the state is limited to those subjects over which its sovereignty extends. Those subjects over which the state is not sovereign is beyond reach of the State for taxation purposes without express exemptions by law.

Second. Defendant in error in its brief expressly presented the question that the lease itself being an admitted Federal instrumentality was free from tax by the state and therefore the product or

income therefrom was likewise exempt from tax. This was neither discussed nor passed upon by this Court.

This is an appeal from a judgment of the District Court of Ottawa County, Oklahoma, in a cause wherein the Jaybird Mining Company, a corporation, was plaintiff, and the plaintiff in error, Joe Weir, county treasurer of Ottawa County, Oklahoma, was defendant. The controversy grows out of an attempt on the part of the taxing officials of Ottawa County, Oklahoma, to tax lead and zinc ores in the [fol. 57] bins at the mines of defendant in error before the same had been sold, said ores having been produced from certain restricted allotted Quapaw Indian lands, pursuant to lease executed to defendant in error under authority of an Act of Congress of June 7, 1897 (30 Stat. L. 907), the restrictions on said lands having been further extended by Act of Congress March 3, 1921 (41 Stat. L. 1225-48). The tax attempted to be levied under the alleged authority of Sec. 9814, Com. Stats. Oklahoma 1921.

The taxes in question were paid under protest and suit brought against the county treasurer within the time provided by law for their recovery, the company alleging that the taxing officials were without authority of law to make such assessment and collection, such want of authority being by reason of the alleged fact that the defendant in error in carrying out the terms of its lease was a Federal agency, and the tax in question was an illegal interference with such agency and for the further reason that the lease itself being exempt, the income therefrom was likewise exempt. The plaintiff in error demurred to said petition, which demurrer on hearing was [fol. 58] overruled. The county treasurer elected to stand on his demurrer and judgment was thereupon rendered in favor of the plaintiff, defendant in error here.

In the opinion of the learned Commissioner, Mr. Commissioner Pinkham, it is found that the property in question is subject to taxation for the reason:

"All property in this state, whether real or personal, except such as is exempt, shall be subject to taxation. Section 9574, Com. Stat. Okla. 1921.

"Sec. 9575, Com. Stat. 1921, enumerates the property that shall be exempt from taxation, but ore in bins is not included therein."

We submit that while it is true that in express words "ore in bins" is not exempted from taxation, yet the mere fact that a specific kind of property is not in words exempted, does not conclude the matter. We submit that there is no question but that leases on restricted Indian lands are exempt from taxation. In re Indian Territory Illuminating Oil Co. v. Oklahoma, 43 Okla. 307, 142 Pac. 997. And as to the proposition that the leases in the last mentioned case were not taxable see Indian Territory Illuminating Oil Co. v. Okla., [fol. 59] 240 U. S. 522, 60 Law. ed. 779, 36 Supreme Court Reporter 453, yet leases on restricted Indian lands are not expressly exempted by the statute referred by the learned Commissioner.

The facts are that under Section one of the Enabling Act (334 Stat. L. 367) the State of Oklahoma is expressly prohibited from impairing the rights of property pertaining to the Indians in said territories or to limit or affect the authority of the government of the United States in carrying out its agreements and treaties with such Indians. In Indian Territory Illuminating Oil Co. v. Oklahoma, supra, the act under which the leases were made was as follows:

"By the act of 1891 it was provided: 'That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.' Com. St. 1913, Sec. 4218."

The Act of Congress under which the leases under consideration in the case at bar were executed is as follows:

[fol. 60] "By the Act of June 7, 1897 (30 Stat. L. 72), it is provided that:

" 'The allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining or business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability of any allottee he cannot improve or manage his allotment property and with benefit to himself the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

It will be seen that there is no distinction in the authority of the government to make such contract, and it can hardly be conceived that the Supreme Court of the United States would construe the rights of the lessees granted under either of the acts above quoted in any different manner. In Indian Territory Illuminating Oil C. v. Oklahoma, supra, in passing upon the taxability of a lease executed under the Act of Congress quoted above the court says, after referring approvingly to the case of C., O. & G. R. R. Co. v. Harrison, 235 U. S. 292 59 Law. ed. 234, 35 Supreme Court Reporter [fol. 61] 27, a case in which it was held that the gross receipts law as applied to coals mined from restricted Indian lands in Oklahoma was invalid as an attempt to tax an instrumentality of the United States.

"A tax upon the leases is a tax upon the power to make them could be sued to destroy the power to make them. * * *

"It follows from these views that the assessment against the oil company so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company is invalid."

We believe that the learned Commissioner overlooked the distinguishing factor to be used in determining the taxing power of the state. This factor is plainly presented in the case of Weston v. Charleston, 2 Peters 449, 7 Lad. ed. 481, cited in brief of defendant in error at page 12, in which case Mr. Chief Justice Marshall says:

"'All subjects over which the sovereign power of a state extends are objects of taxation but those over which it does not extend are upon the soundest principles exempt from taxation.' 'The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission;' but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.'"

[fol. 62] Undoubtedly this must have been in the minds of the writers of the Enabling Act when they expressly provided that the new State of Oklahoma could not limit or effect the authority of the government of the United States in respect to its dealing with the Indians and their property.

However, the learned Commissioner in the case at bar would separate for purposes of taxation the ore after it was produced but before it was sold, and before the Indian has received his royalty, into a separate form of property for the purpose of taxation. This is attempted for the obvious reason that inasmuch as in the opinion of the Commissioner, the exact proposition raised in the case at bar, had been passed upon in the case of In re Skelton Lead & Zinc Company Gross Production Tax, 81 Okla. 134, 197 Pac. 495, in which it was conceded that the "operation of this character of lease is a Federal instrumentality * * *." And the attorneys for plaintiff in error in their brief, at page 10, having conceded that the lease in question was a Federal instrumentality and the Supreme Court of the United States in the case of Gillespie v. Oklahoma, 257 U. S. 501, 66 Law. ed. 338, having held that the income from such a lease was [fol. 63] exempt the only possible method to tax the property in the case at bar was to call it a separate taxable entity.

This position, while in our opinion untenable, is obviously taken in attempting to follow the arguments of the learned Attorney General in this case and in the case of Gillespie v. Oklahoma, supra. In the case of Gillespie v. Oklahoma, supra, it was contended by the learned Attorney General that the income from the restricted leases held by the lessee was a separate taxable entity. In the brief in the Gillespie case filed in the Supreme Court of the United States by the Attorney General of the State of Oklahoma, page 6, it is said:

"Income has been set apart and classified by the Legislature as a separate and independent taxable entity, regardless of its source, and

for the purpose of taxation such income has no relation to any particular property or business

"It will be seen from the above that income taxation is distinguishable from other forms in that the tax is assessed upon income, as such, instead of upon the property or the operation of a trade, business or profession from which said income may have been derived."

This is so obviously an untenable position that the Supreme Court of the United States in the Gillespie case, supra, does not so much as [fol. 64] mention it. Since the case of Pollock v. Farmer's Loan & Trust Co., 157 U. S. 429, rehearing denied, 158 U. S. 601, it has no longer been open to question, but that upon income is a tax upon the principal from which such income is derived. Mr. Chief Justice Field in his opinion in the Pollock case (157 U. S. at page 591), says:

"It must be conceded that whatever affects any element that gives an article its value, in the eyes of the law, affects the article itself."

In the face of these opinions how can it be said that a tax upon the very thing (ore) from which the income is to be received, will not affect such income or amount to a tax upon the income? To ask the question is to answer it.

The learned Commissioner says:

"In the case of In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919, supra, the exact proposition raised by the company in the case at bar was decided adversely to its contention."

We do not agree with the Commissioner in this, for the reason that the tax in question, as shown by the title of the case in the last mentioned case, was a gross production tax, in the present case it is an at- [fol. 65] tempt to levy an ad valorem tax. However, we concede that if the case last above mentioned is the law as to gross production from these restricted Indian lands, the learned Commissioner is probably right in his decision in the case at bar. It is further said in the opinion in the case at bar that it was the contention of defendant in error that the ruling in the Skelton company case was not sound in view of the decision in the case of Oklahoma v. Gillespie, supra. This is a correct statement. The facts with reference to the Gillespie case and the Skelton Lead & Zinc Company's case are best shown by a quotation from the opinion of the Supreme Court of Oklahoma in State v. Gillespie, 81 Okla. 103, 197 Pac. 508:

"As to the second proposition, the question of validity of the precise tax here involved depends primarily upon the validity of the gross production tax provided for in Chap. 39, Sess. Laws 1916, as applied to the lessee's private share of the products from departmental leases upon restricted lands, and the gross production tax being a property tax, as was held by the Supreme Court of the United States in Shaffer v. Carter, supra, the validity of which, as a prop-

erty tax upon the same class of property here involved, was sustained by this court at this term in Re Protest of Skelton Lead & Zinc Co. (No. 11194), 197 Pac. 945, not yet (officially) reported, then, upon the authority of said cases and the reasons therein given, the validity [fol. 66] of the income tax involved herein is sustained."

It must be apparent from the above statement that unless the decision of the Supreme Court of Oklahoma could stand in the Gillespie case it cannot stand in the Skelton case, this for the obvious reason that "upon authority of said cases and the reasons therein given, the validity of the income tax involved herein is sustained." The Supreme Court of the United States in the Gillespie case, supra, expressly reversed the Supreme Court of Oklahoma, saying:

"The conditions that invalidate a tax upon the leases invalidates the tax upon the profits of the leases; and stopping short of theoretical possibility, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms it can for its wards."

The defendant in error in the case at bar further contends that the opinion as delivered by the learned Commissioner in the case at bar is in direct conflict with the opinion of the Supreme Court of the United States in the case of Gillespie v. Oklahoma, 257 U. S. 501, supra. And that said decision in the Gillespie case is decisive and [fol. 67] controlling upon the question at bar. In considering the Gillespie case the learned Commissioner says "the only question in the case is whether he (the lessee) is liable to this kind of a tax." The exact language of Mr. Justice Holmes in the Gillespie case, supra, in the sentence partially quoted by the learned Commissioner is:

"It is agreed that the lessee was an instrumentality used by the United States in carrying out duties to the Indians that it had assumed, and that the only question in the case is whether he is liable to this kind of tax."

Further on in the opinion by the learned Commissioner in this court in the case at bar it is said:

"The kind of a tax involved in the Gillespie case was an income tax, obviously distinct from ad valorem tax on tangible private personal property."

The fact is that as a question of law there could be no distinction between the kinds of tax called into question by the learned Commissioner as is decisively passed upon in Pollock v. Farmer's Loan & Trust Co., supra, and Brushaber v. Union Pacific Ry., 240 U. S. 1. And it must be obvious to this court that to say that you cannot tax the income from this lease but you can tax the very thing from [fol. 68] which the income is to be derived (and thereby absolutely deprive the lessee of any income) would be ridiculous. The reason

the income cannot be taxed is, according to the Supreme Court of the United States "* * * a tax upon such profits is a direct hamper upon the efforts of the United States * * *." However, as we understand the Gillespie opinion as written by the Supreme Court of the United States, the State of Oklahoma there conceded that a tax upon the income of Gillespie as received from his leases on restricted Indian lands was a tax upon his (Gillespie's) share of the oil and gas. In other words, it was identically the kind of a tax that is attempted in this case. Certainly there could be no reason why the State could not tax the money derived from the sale of the ore if it could tax, as contended for by the plaintiff in error in the case at bar, the very thing from which the money was to be received. Referring again to the Gillespie case in the Supreme Court of the United States to show what was really before the court, Mr. Justice Holmes, in going over the arguments and contentions of the State of Oklahoma, says:

[fol. 69] "It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape."

All this must have been the view of the Supreme Court of Oklahoma before the Supreme Court of the United States reversed said court in the Gillespie case, for Mr. Justice Harrison said in the Gillespie case in the Oklahoma Supreme Court:

"* * * the question of validity of the precise tax herein involved depends primarily upon the validity of the gross production tax provided for in Chap. 39, S. L. 1916, to the lessee's private share of the products from Departmental leases upon restricted lands * * *."

It is therefore only too apparent that in the Gillespie case and in the case at bar the State of Oklahoma, through its taxing officials, was and is attempting to levy such a tax upon leases on restricted Indian lands and the products therefrom, as will amount to a hampering of the efforts of the United States.

We have endeavored to show in this brief petition that the decision of the learned Commissioner in the case at bar is in conflict [fol. 70] with the controlling decisions of the Supreme Court of the United States, and that such decisions are controlling upon this court. The question involved in this case is one that has been before the Supreme Court of the United States a number of times, in C. O. & G. R. R. Co. v. Harrison, supra; in Indian Territory Illuminating Oil Co. v. Oklahoma, supra; in Howard v Gypsy Oil Co., 247 U. S. 503; in Large Oil Co. v. Howard, 248 U. S. 549, and in Gillespie v. The State of Oklahoma, supra.

In each and every one of the numerous appeals upon this question the alleged right of the State to tax these "admitted" Federal instrumentalities has by the Supreme Court of the United States been vigorously denied. As was suggested to the Honorable Commission-

ers upon the oral argument of this cause in this court, there are at this time a large number of cases now pending in the district court of Ottawa County, Oklahoma, in which this identical question is involved. It would be an unnecessary expense upon both the State and the defendants in error to again take this question to the Supreme Court of the United States. We therefore respectfully pray [fols. 71 & 72] that a rehearing of said cause be granted by this Honorable Court; that said cause be set for oral argument before the Supreme Court of this State, in order that both the plaintiff in error and defendant in error may present this vital question, construction of the Enabling Act, and the various Federal statutes under which these lands were allotted and leased, to the Justices of the Supreme Court of the State of Oklahoma.

A. Scott Thompson, Attorney for Defendant in Error. A. C. Wallace, Vern E. Thompson, Ray McNaughton, all of Miami, Okla., of Counsel.

[fol. 73] IN THE SUPREME COURT OF OKLAHOMA

No. 14059

JOE WEIR, County Treasurer of Ottawa County, Oklahoma, Plaintiff in Error,

vs.

JAYBIRD MINING COMPANY, a Corporation, Defendant in Error

MOTION FOR ORAL ARGUMENT ON PETITION FOR REHEARING

Comes now the Jaybird Mining Company, defendant in error herein, and moves this Honroable Court that oral argument be heard in the presentation of its petition for rehearing in the above styled cause attached hereto and further moves that this matter be heard before the Supreme Court for the following reasons:

This case involves the sustaining or overruling of a judgment of the District Court of Ottawa County, Oklahoma which, in effect, necessarily held that a former opinion of this Supreme Court had been in principle overruled by the Supreme Court of the United States.

[fol. 74] Attorneys for the defendant in error represent to the Supreme Court that this is a test case and is presented to the court upon the theory that its former holding In re Skelton Lead & Zinc Company Gross Production Tax, 81 Okla. 134, has been reversed by the Supreme Court of the United States in the case of Gillespie v. State of Oklahoma, 257 U. S. 501. They further represent that there are a large number of cases held in the District Court of Ottawa County, Oklahoma, awaiting the final decision in this case and that it involves a question of importance to the County of Ottawa and the lead

and zinc industry and the administration of Indian Affairs in the State of Oklahoma. For these reasons and particularly because the attorneys for the defendant in error are urging that this Court should overrule its former opinion in the Skelton case upon the authority of Gillespie v. State of Oklahoma, this petition for rehearing should be presented to the Supreme Court and oral argument should be had thereon.

A. Scott Thompson, Attorney for Defendant in Error. A. C. Wallace, Vern E. Thompson, Ray McNaughton, all of Miami, Okla., of Counsel.

[fol. 75] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—December 9, 1924

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

[fol. 76] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—Filed December 13, 1924

The above matter coming on to be heard upon the application of defendant in error for stay of issuance of mandate until appeal papers may be prepared and submitted,

It is the order of this Court that issuance of mandate herein to the lower court be and the same is hereby stayed until January 9, 1925.

N. E. McNeill, Chief Justice.

[fol. 77] IN SUPREME COURT OF OKLAHOMA

CLERK'S CERTIFICATE

I, William M. Franklin, clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 76 pages, numbered from 1 to 76, both inclusive, are a full, true and complete transcript of the record and all proceedings had in cause number 14,059, entitled Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in error, versus Jaybird Mining Company, a corporation,

Defendant in error, as the same remains of record and on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 15th day of January, 1925.

Wm. M. Franklin, Clerk Supreme Court Oklahoma, by Jessie Pardoe, Deputy. (Seal Supreme Court, State of Oklahoma.)

Endorsed on cover: File No. 30,894. Oklahoma Supreme Court. Term No. 929. Jaybird Mining Company, plaintiff in error, vs. Joe Weir, as county treasurer of Ottawa County, Oklahoma. Filed February 24th, 1925. File No. 30,894.

POSTPONED TO MERITS

MAY 4- 1925

No. [redacted] 293

IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION, PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA COUNTY, OKLAHOMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

A. SCOTT THOMPSON,
Miami, Oklahoma,
Attorney for Petitioner.

A. C. WALLACE,
VERN E. THOMPSON,
RAY MCNAUGHTON,
All of Miami, Okla.,
Of Counsel.

INDEX.

No. .....

IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION, PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA COUNTY, OKLAHOMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Jaybird Mining Company, most respectfully shows to the court as follows:

I.

This action was brought by your petitioner originally, and filed in the District Court of Ottawa County, in the State of Oklahoma, on the 28th day of January, 1922, against the respondent, Joe Weir, county treasurer of Ottawa County, Oklahoma, charging:

(a) That the petitioner was a corporation organized and existing under the laws of the State of Oklahoma and engaged in the mining of lead and zinc ores in

Ottawa County thereof, and the respondent was the duly elected, qualified and acting county treasurer of said county, and as such officer was collecting taxes for the year of 1921.

(b) That the Congress of the United States, on March 2, 1895 (28 Stats. p. 907) enacted the following statute:

> "*Be it enacted,* etc., that the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; Provided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

That pursuant to the authority granted in said act, the Secretary of the Interior caused a patent to be issued to Hum-bah-wat-tah Quapaw, a member of the Quapaw tribe of Indians, for an allotment of land described as Southwest Quarter of Northeast Quarter of Section 30, Township 29 North, Range 23 East of the Indian Meridian, in Ottawa County, Oklahoma, containing a restriction against alienation for the period of twenty-five years from the date thereof, the 26th day of September, 1896; that the restrictions against alienation on said al-

lotment were further extended by act of Congress dated March 3, 1921 (41 Stats. 1225-1248) for an additional period of twenty-five years thereafter.

(c) That the Congress of the United States, on June 7, 1897 (30 Stats. p. 72) enacted the following statute:

> "That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary; Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

That the Quapaw tribe of Indians, of which Humbah-wat-tah Quapaw was a member, were within the limits and jurisdiction of the Quapaw Agency and came within the provisions of the last-mentioned leasing statute, and the lands above described have been at all times and now are subject to the restrictions and limitations imposed in said acts of Congress and the patent issued thereunder.

(d) That your petitioner is now and has been for several years last past operating a lead and zinc mine

upon the above described property, and did have in its ore bins on January 1, 1921, a quantity of lead and zinc ores mined during the year of 1920; that your petitioner mined said ore pursuant to its right obtained under mining lease executed under the terms of the leasing statute above mentioned, and was approved by the Secretary of the Interior pursuant to authority granted in the act of Congress of June 7, 1897, *supra*.

(e) That the said allottee and her heirs have been at all times, and now are, wards of the United States Government, and the Secretary of the Interior had, prior to the production of said minerals, declared said Indian land owners to be incapable of managing their allotted lands with benefit to themselves, and said Secretary of the Interior had assumed control and management of the mining of said lands for and on behalf of said Indian owners, and all royalties accruing on ores had been paid direct to the Secretary of the Interior.

(f) That Congress, by the acts above named, expressed the policy of the Federal Government towards the leasing of Quapaw lands and securing the development of minerals thereunder for the benefit of the Indian owners and the leasing thereof by the Secretary of the Interior was an act of the Secretary of the Interior carrying out the policy of the United States Government.

(g) That your petitioner, in carrying out its contract with the Secretary of the Interior in the mining of lead and zinc ores under its lease, was complying with and carrying out the terms of a Federal agency and

governmental policy toward its Quapaw Indian wards, with a view of protecting and developing the mineral lands of these Indians.

(h) That on January 1, 1921, the ores sought to be taxed by the State of Oklahoma were in the bin in mass, with the royalty or equitable interest of the Indian landowner unsegregated and unpaid, the terms of the lease providing for payment of royalty or percentage of gross proceeds derived from the sale thereof.

(i) That your petitioner has paid to the Auditor of the State of Oklahoma, pursuant to Chapter 39 of the Session Laws of 1916 of the State of Oklahoma, the gross production tax on the ores so assessed when sold and during the tax year in which same was produced, and prior to June 30, 1921.

(j) That the taxing officials of Ottawa County, Oklahoma, for the year of 1921 wrongfully and unlawfully, and without authority, caused the ores in the bins of this petitioner on said land on January 1, 1921, to be assessed an *ad valorem* tax in the amount of $2319.80. Your petitioner, pursuant to the statutes of the State of Oklahoma, paid said tax so assessed under protest.

(k) That the taxing officials of Ottawa County and the State of Oklahoma were without authority to assess any *ad valorem* tax as against said ores for the reason said ores were exempt from state tax, as the petitioner was a part of a Federal agency and was assisting the Secretary of the Interior and the United States Government in carrying out a governmental policy toward wards of the Government.

II.

That your petitioner did, within thirty days after payment of said tax, file its suit in the District Court of Ottawa County, Oklahoma, for the recovery of moneys so paid.

III.

The respondent filed a general demurrrer to the petition filed, and after same was overruled by the court refused to plead further, and the court thereupon entered judgment on the 8th day of July, 1922, in favor of your petitioner for the sum prayed for together with interest thereon.

IV.

The respondent perfected an appeal from the judgment of the District Court of Ottawa County, Oklahoma, to the Supreme Court of the State of Oklahoma, and after argument thereon the Supreme Court of the State of Oklahoma reversed the judgment of the District Court and directed the District Court to enter judgment sustaining the demurrer of the county treasurer, respondent herein, and held:

> "Where lead and zinc ores extracted from lands of restricted Quapaw Indians are stored in the bins of the lessee and assessed for taxation on the day fixed by the laws of the state, such ores, being personalty and private property of the lessee, are not exempt from *ad valorem* taxation."

And further held:

> "The tax imposed by Section 9814, Compiled Statutes of 1921, is not upon a Federal agency nor upon the right to exercise or operate a Federal agency, but is upon the lessee's individual private property."

The opinion of the Supreme Court of the State of Oklahoma was filed on October 21, 1924. Thereafter and within the time allowed by rules of said court, petition for rehearing was filed and same was denied by the Supreme Court of the State of Oklahoma in its order filed on December 9, 1924.

V.

Your petitioner is advised and believes that the said judgment of the Supreme Court of the State of Oklahoma, which is the court of last resort in said state having jurisdiction of this cause, is erroneous, and that this honorable court should require said case to be certified to it for its review and determination, in conformity with the provisions in Section 237 of the Federal Judicial Code.

VI.

A certified copy of the entire record of said cause in the Supreme Court of the State of Oklahoma is hereby furnished, attached to and made a part of this petition, and marked Exhibit "A," in compliance with the rules of this court.

VII.

Your petitioner believes the judgment of the Supreme Court of the State of Oklahoma herein rendered is erroneous in that it holds valid an *ad valorem* tax upon the gross product of a Federal agency engaged in carrying out the governmental policies toward Indian wards of the Government, and further in holding that the product of the lease is taxable by the State of Oklahoma while conceding that the lease itself is exempt from any tax by said authority.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Oklahoma in said case entitled *Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in Error* v. *Jaybird Mining Company, a Corporation, Defendant in Error*, No. 14059, to the end that the said case may be reviewed and determined by this court as provided by Section 237 of the Federal Judicial Code; or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Federal Judicial Code; and that the said judgment of the Supreme Court of the State of Oklahoma in said cause, and every part thereof, may be reversed by this Honorable Court.

R. Scott Thompson

Attorney for Petitioner.

State of Oklahoma, County of Ottawa, ss.

A. Scott Thompson, attorney for Jaybird Mining Company, of lawful age, being duly sworn, on oath says: That he is attorney for petitioner in the above entitled cause, and that he has read the above and foregoing petition for writ of certiorari; that he is advised and he believes the allegations therein contained are true.

.....

Subscribed and sworn to before me this .... day of January, 1925.

....,
Notary Public.

My commission expires.

No. .....

IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, DEFENDANT
IN ERROR.

WRIT OF CERTIORARI.

United States of America, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Being informed that there is now pending before you a suit in which Joe Weir, County Treasurer of Ottawa County, Oklahoma, is plaintiff in error, and Jaybird Mining Company, a corporation, is Defendant in Error, No. 14059 of your docket, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by said Supreme Court of the State of Oklahoma and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the Supreme Court as afore-

said, the record and the proceedings in said cause, so that the Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States.

.....,
Clerk of the Supreme Court of
the United States.

No. .....

IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, DEFENDANT
IN ERROR.

JAYBIRD MINING COMPANY, A CORPORATION,
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, RESPONDENT.

BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER.

STATEMENT.

For convenience in presenting this matter we will refer to the parties as they appeared plaintiff and defendant in the trial court.

The petition for writ of certiorari, immeliately preceding herein, correctly states the facts concerning this

cause. As therein stated, a judgment was rendered upon demurrer, and the sole question involved is the taxability of the ores of the plaintiff.

The plaintiff has perfected an appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States by writ of error and also by petition for writ of certiorari, out of abundance of caution. We will attempt to secure and file with the court a stipulation agreeing that the two may be presented together under the same brief. We believe it unnecessary to make further statement concerning this cause.

In the Supreme Court of the United States. Jaybird Mining Company, a Corporation, Plaintiff in Error, vs. Joe Weir, County Treasurer of Ottawa County, Oklahoma, Defendant in Error.

ASSIGNMENT OF ERRORS.

Comes now Jaybird Mining Company, a corporation, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of judgment of the Supreme Court of the State of Oklahoma, and in the opinion filed therein in said cause, manifest errors were committed to its prejudice, which are apparent in the record therein; that the errors committed by the Supreme Court of the State of Oklahoma in the opinion and judgment therein, in said cause, are more fully and particularly set forth as follows:

I.

The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Ottawa County, Oklahoma, and directing that judgment should be entered by said District Court in favor of the defendant in error herein.

II.

The Supreme Court of the State of Oklahoma erred in refusing to affirm the decision of the District Court of Ottawa County, Oklahoma.

III.

The Supreme Court of Oklahoma erred in holding, deciding and determining the statute of the State of Oklahoma approved February 14, 1916, and being Chapter 39 of Session Laws of the State of Oklahoma, extra session, page 102, imposing gross production taxes, are valid, and rendering a decision in favor of its validity, and in not holding it repugnant to the Constitution, treaties and laws of the United States.

IV.

The Supreme Court of Oklahoma erred in holding, deciding and determining that the acts of the Treasurer of Ottawa County, Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by the statute mentioned in specification or assignment of Error No. 3 preceding, and other statutes of the State of Oklahoma authorizing the assessment of an *ad valorem* tax, are and were valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, treaties and laws of the United States.

V.

The Supreme Court of Oklahoma erred in sustaining the validity of the gross production tax law above specified and the statutes of the State of Oklahoma authorizing the assessment of an *ad valorem* tax on lead and zinc ores in the bin on January 1 of the current year, upon such ores unsold of the plaintiff in error herein,

derived and produced solely from lead and zinc mining leases upon restricted Indian lands under the control of Congress and the Secretary of the Interior.

VI.

The Supreme Court of Oklahoma erred in reversing the judgment or decree of the District Court of Ottawa County, Oklahoma, and in holding and denying that plaintiff in error was exempt from *ad valorem* tax upon the property so charged, claimed by the plaintiff in error under the Constitution, treaties and laws of the United States.

For which errors the said Jaybird Mining Company, plaintiff in error, prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, and that the Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Ottawa County, Oklahoma, as rendered; and for such other and further relief as to the court may seem just and proper, and for its costs.

A. SCOTT THOMPSON,
Attorney for Plaintiff in Error.

BRIEF AND ARGUMENT.

I.

The tax assessed herein under the authority of the Oklahoma "Gross Review" Act of 1916 is void for the reason it constitutes a burden upon the operation of a federal agency and an interference with the exercise of the constitutional powers of the United States government.

The lands from which the ore sought to be taxed herein was taken are owned by a Quapaw restricted Indian. The Quapaws are still under national tutelage. The Government maintains an agency for the supervision of these Indians and their property, and pursuant to the treaty of May 13, 1833 (7 Stat. 424), an annual appropriation is made for education and other assistance (37 Stat. 530). This view is stated as a correct one in *U. S.* v. *Noble et al.*, 237 U. S. 74. The Government in its treaty with the Quapaws dated May 13, 1833, *supra*, expressed its policy toward these Indians in obligations assumed that are now in full force. They are observed and performed even to this day. Among other things the Government there and then agreed:

> "Art. 11. The United States hereby agree to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the Commissioners of Indians Affairs west, and which is expressly designed to be in lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent

> home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon, *and they also agree to protect them in their new residence,* against all interruption or disturbance from any other tribe or nation of Indians or *from any other person or persons whatever."*
>
> 2 Kappler Indian Affairs, 396.

Carrying out its treaty obligations to "protect them in their new residence," the Government, by Act of Congress approved March 2, 1895 (28 Stat. 907) allotted these lands in severalty, but with a prohibition against alienation for a period of twenty-five years in the following language:

> "Be it enacted, etc. That the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, that any allottee who may be dissatisfied with his allotment shall have all rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith; provided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

It has been definitely and finally held in *Goodrum* v. *Buffalo,* 162 Fed. 817, that the above act and the patent issued thereunder to a Quapaw Indian prohibited alienation by the allottee or his heirs for the period fixed, and the court said:

> "Throughout the dealings with them, both by treaties and legislative enactments, the general government has, from a sense of justice to the Indians, as well as from a conception of sound public policy, found it to be wise and obligatory to safeguard these dependent subjects in their property rights against the mastery and craft of the white man. So long as their reservations remained communistic, the property of the tribe, as such, was not jeopardized by attempted acquisition by outsiders; but when their tribal relations were disrupted, at the solicitation of the Government Commissioners, and it was proposed to allot the lands in severalty among those entitled thereto, Congress was confronted with a grave responsibility and duty it could not in honor shirk. The problem was experimental. The underlying policy in this rearrangement of treaty stipulations with the Indians was to stimulate in them a spirit of self-assertion and reliance, by inculcating the habit of industry and self-support. Feeling a strong misgiving as to their capacity and inclination to hold their allotments, to establish and maintain the family home, to soon conquer their inherent indolence and wastefulness, and apprehensive of their lack of virtue and moral courage to withstand temptation to part with their inheritance for 'a mess of pottage,' the whole legislation of Congress touching the allotment of Indian lands expresses on its face this feeling of distrust and a determined policy to put the allottees on probation during this experimental period. Accordingly, while authorizing the allotments in severalty, Congress conceded the lands, with a firm cable at-

> tached to hold them to the exclusive use and possession of the Indians, without qualification restricting the power to divest themselves of the use and title until after the fixed period. * * *"

Still observing its treaty obligation to protect these Indians in their allotted lands, and seeking to encourage the Indians in the exploitation of their property, the Government went a step further in the Act of Congress approved June 7, 1897 (30 Stat. 72) worded as follows:

> "That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

It appears from our statement that the mining lease under the terms of which the ore in question was mined was approved by the Secretary of the Interior. The land owner had been declared incompetent under the Act of June 7, 1897, *supra*, and full management, supervision and control over the mining of this land had passed completely to the Department of the Interior.

The Government through the leasing privilege extended to the Indian was experimenting with a view of development of business methods in the Indian. But by the later Act of March 3, 1921 (41 Stat. 1225-1248) Congress extended the restrictive period until March 3, 1946, and recalled the leasing privilege. This evidences two certain things: First, a conclusion by the Government that it could not faithfully keep its treaty promises to protect these lands for the enjoyment of the wards of the nation and permit the individual Indian to lease his own land. Second, that while the Government under the Act of June 7, 1897, *supra,* retained management and control over the mining of these lands where the Indian owner was incapable, it now assumed full control over the mining of all restricted Quapaw lands.

It was said in *U. S.* v. *Noble, supra,* that:

> "It was the intent of Congress that the allottees during the period of restriction should be secure in their actual enjoyment of their interest in this land."

The court here was discussing a Quapaw case. The enjoyment by the Indian of his interest in mining land could only mean the enjoyment of the benefits to accrue by development, extraction and marketing of the ores found thereon. It being the intention of Congress to secure this to the Indian, legislation as above referred to was enacted from time to time.

The Government in carrying out its promises to protect these Indians and their lands was functioning under powers granted exclusively to it. It had one of

two choices: Prospect, explore and mine this land for the enjoyment of the Indian, or lease it to experienced miners under the supervision of the Government. The Government chose the latter course. In this choice it avoided the usual hazards and losses incident to zinc mining. They were assumed by the lessee and for which his compensation is fixed by the Government. The mere fact that the latter course was chosen does not change the fact that the Government is through its proper officer, the Secretary of the Interior, causing these Indian restricted lands to be mined.

In so far as the right of the State of Oklahoma to tax these leases, mines, products thereof, net or gross, or fix any kind of burden thereon, is concerned there can, we submit, be no difference whether the mining be done by the Government itself or the duty be delegated to this lessee under the practice as detailed above. The fact is ever present that the obligation of the Government is plain and its exclusive constitutional power is unquestioned.

The Congress of the United States, keeping in mind the treaty obligations of the Federal Government and its established policy of guardianship over these Indians, in the exercise of its governmental function fixed by the Constitution of the United States, withheld from the State of Oklahoma in the Enabling Act any power to limit or affect the complete authority of the Government of the United States in the premises in the following words:

"Section 1. Admission of Oklahoma and Indian Territory as State. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed" (334 Stat. L. 367).

It may be we unnecessarily state at length the history of the Government's connection with these Quapaw lands. Counsel for defendant in the court below admit this lease in question is a governmental instrumentality. The Supreme Court of the United States, in *Railway* v. *Harrison*, 235 U. S. 292, *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, *Howard* v. *Gypsy Oil Co.*, 237 U. S. 504, and *Large Oil Co.* v. *Howard*, 248 U. S. 549, has held to the same effect.

Federal Instrumentalities are Not Subject to State Tax Burden.

State instrumentalities likewise are exempt from tax burden imposed by the National Government.

Why is this true? The Constitution of the United States contains no express limitation on either in the premises. But it is necessarily implied. This, because of

the very nature of our plan of government. It is a dual government, national and state, each equally supreme within its limited sphere of sovereignty. This limitation of supremacy is not fixed by state boundary lines, but rather by limits of sovereignty determined by the Constitution of the United States. The right to burden with tax is confined to the same limits.

This theory, now well established, is based upon the theory that the Constitution of the United States as a whole created two separate and distinct sovereignties, independent of each other in their specific and reserved powers, and that however full the grant of power of taxation might be in the constitution, there must always be subtracted from that power the right of the different sovereignties to perform their functions as such. As said by Mr. Chief Justice Marshall in *McCullough* v. *Maryland,* 4 Wheat 466, this proposition "has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

Owing to statements that sometimes are made in the opinions of state courts, and particularly the Supreme court of Oklahoma in the "Gross Production Cases," concerning authority or power of the state to tax all property within its boundary limits, it is well to further quote from the same opinion wherein the court said:

> "1st, that a power to create implies a power to preserve. 2nd, that a power to destroy, if wielded by a different hand, is hostile to, and in-

compatible with these powers to preserve. 3rd, that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

The taxing power of a state extends to and stops with the limits of its sovereignty. What are the limits? The Supreme Court in the same case answered:

> "The sovereignty of a state extends to everything which exists *by its own authority*, or is introduced by *its permission;* but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? *We think it demonstrable that it does not.*"

The court summing up further said:

> "The power to tax involves the power to destroy. The power to destroy may render useless the power to create. * * *
>
> "The result is a conviction that the states have no power, by taxation or otherwise, *to retard, impede, burden or in any manner control,* the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

This principle enunciated in *McCullough* v. *Maryland* has been affirmed many times by the Supreme Court of the United States. In addition to cases heretofore cited, we refer the court to:

Weston v. *Charleston,* 2 Peters, 449, 7 L. Ed. 481, where the court said:

> "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits."

In *Brown* v. *Maryland,* 12 Wheaton, 419, 6 L. Ed. 678, the court said:

> "It is obvious that the same power which imposes a light duty, can impose a very high one, one which amounts to a prohibition."
>
> *People* v. *Commissioners,* 2 Black 620, 17 L. Ed. 451.
>
> *Osborn* v. *The U. S. Bank,* 9 Wheaton, 738.

In *Van Bracklin* v. *Anderson,* 117 U. S. 151, 29 L. Ed. 845, the court said:

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

Bearing in mind Chief Justice Marshall's definition of state sovereignty as

> "extending to everything which exists by its (state) own authority"

and that the right of taxation extends only over that which exists by its own authority, where does the State of Oklahoma secure the right to impose any tax of any kind, be it license, occupation or *ad valorem* in character, upon the property, output, net or gross, or income, used in or derived from these mines of the agents selected by the National Government to carry out its treaty obligations with the Quapaw Indian wards?

Are these mines in Quapaw lands improved and operated by authority or permission of the State of Oklahoma? Certainly not. The Enabling Act reserved

from the state all such powers or privileges. Were the rights to mine and the burdens upon the lessee to improve with mill, develop, produce and market ore, *created* or imposed by the sovereign State of Oklahoma? Certainly not. Then if the right to tax is co-existent with and limited to sovereignty, and sovereignty ceases with the authority to create or permit, wherein can it be seriously urged that the State of Oklahoma can rightfully assess a tax of any kind whatsoever upon the property used in or produced from these mining properties?

We cite also:

California v. *Railroad Co.*, 127 U. S. 1, 32 L. Ed. 150.

Pollock v. *Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759.

The Supreme Court of Oklahoma, in this and kindred cases, have repeatedly held:

> "that the states are sovereign and the right to tax necessarily follows sovereignty."

It is sovereign over porperty only

> "which exists by its (state) authority or is introduced by its permission."

The failure to recognize this clearly and well established distinction is responsible for the necessity of numerous appeals to the Supreme Court of the United States from attempts of the State of Oklahoma to exact a tax on these Indian properties. In each case the result has been the same, the principle has been reaffirmed.

The state may argue this is a property tax or an *ad valorem* tax or some other kind of tax, but it is a burden that retards. We cannot escape it. The name of tax is immaterial and the Supreme Court of the United States in these various cases from Oklahoma has seen fit to place its decision upon that ground rather than the name assigned by the state court and after all, the determination of the nature of the tax by a court is not binding on the Supreme Court of the United States.

> "Upon the question of constitutionality of a tax levied under the state law, the Supreme Court must determine the nature of the tax for itself, and is not bound by the name given it by the state court."

New York, Phil. Tel. Co. v. *John I. Dolan et al.*, U. S. Supreme Court Reporter, Advance Opinion No. 15, page 535.

The state possesses no power to tax the product of this lessee obtained in its mining operations.

The state will admit the lease in question is a federal instrumentality through which a governmental policy is being carried out for the benefit of Indian wards of the Government, and as such is non-taxable.

This is the conclusion of this court announced in the various cases heretofore named, and more recently in *Gillespie* v. *State*, 257 U. S. 501.

In the Gillespie case the question before the court was whether the State of Oklahoma could assess a state income tax upon income derived from oil royalties under a lease similar to the one here. This court there says:

> "A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them. 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long."

Again:

> "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

The question in the Gillespie case before this court was whether Gillespie's share of oil and gas was taxable:

> "It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape" (this court).

Likewise here the question is: Can the state lawfully assess and *ad valorem* tax on ores of the plaintiff while in the bins unsold and before the royalty interest of the Indian landowner is segregated? These ores were gross profits without deducting royalty and all production costs.

If, as we have seen, "the step from this (invalidity of tax on lease) to the invalidity of the tax upon income (net) from the lease is not long," the stride to the invalidity of the tax upon gross product or gross income would be much less. A tax on the latter would certainly constitute a more direct and serious hamper upon the operations of this federal agency.

If a tax on net income or a part of the gross revenue is a burden or "direct hamper" upon the effort of the National Government, will the attorney general seriously contend a tax on the gross output from month to month, or a tax on the gross output found in the bins on January 1st unsold, *and in each case the expense of production not being deduced,* would in a *less* degree hamper or restrict the United States in making best bargains for its wards? The question is not whether the tax be license, occupational or *ad valorem* in character, nor whether the property sought to be taxed is personal, real, tangible or intangible, but it is: *Does it interfere with the functions of the National Government in carrying out its policies with its Indian wards?* We have seen that it does if an attempt is made to tax the output after all expense of operation is deducted. We have seen that it does if it attempts to assess a tax on the gross output under the 1916 law. *Large Oil Co.* v. *Howard,* 248 U. S. 549. *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503. That the court in the last two cases mentioned had the 1916 law in mind is made clear in the Gillespie case. Is it too far a step to conclude that the same weakness and vice exists in the attempt to burden with *ad valorem* tax a part of the gross output unsold on January 1st without deductions for expense of production or royalty share of the Indian? We submit, beyond doubt there can be no part way, no "part hamper" and no interference of any kind. This is inevitable if we concede "the power to create carries with it the power to preserve,"—a nec-

essary incident to the exercise of all powers of sovereignty.

The Supreme Court of the United States in the Gillespie case distinguishes the cases involving interstate commerce as not being applicable. It hold *Thomas v. Gay*, 169 U. S. 264, not analogous in principle, and then says:

> "The rule as to instrumentalities of the United States, on the other hand, *is absolute in form* and at least stricter in substance."

In other words, the duty of the United States toward these wards of the nation to secure to them enjoyment of the mineral resources on their allotments and to secure the best and highest rewards by bargain, is absolute. If the state may tax this ore production sold or in the bins on any basis, it must be conceded the right is without limit short of confiscation. It may be said the state would not abuse the privilege. This is placing a limitation upon the power to preserve that which a sovereign government has exclusive power to create. It is placing instrumentalities of one sovereign government at the mercy, whim or discretion of a separate and distinct sovereignty: In *McCullough* v. *Maryland, supra*, the court said:

> "But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not * * * This, then, is not a case of confidence."

Can it be now argued that a tax on the product, net or gross, in the bins or out, does not affect the lease contract and the rights of the Indians? The power to tax, rightly understood, is without limit.

> "It bears directly upon the contract, while subsisting and in force. The power operates upon the contract the instant it is framed and must imply a right to affect that contract."
>
> *Weston* v. *Charleston, supra.*

These lessees are required to operate their mines continuously. Depressions in market conditions come. The lessee holds his ore for better prices. The State of Oklahoma steps in and fixes an *ad valorem* tax on ores so held and in the bins on January 1st. The result is a general cleaning of ore bins prior to assessment date, the market is depressed with surplus ores, prices drop, and the Indian owner who is paid a percentage of the sale proceeds, receives a less return because of the forced sale on a depressed market. This may appear frivolous, but when we realize that the local tax rate applicable to some of these properties runs as high as seventeen cents on the dollar we appreciate the conclusion reached by the courts that it "hampers the National Government in obtaining the best contract for its wards." The Indian owner as a rule receives as royalty *five* per cent of the gross proceeds derived from sales of ore. The State of Oklahoma, through its subdivisions, is claiming as high as *seventeen* per cent of the gross value in tax on ores in the bin in Ottawa County on restricted Quapaw lands, The state is seeking to take more than *three times* the

portion of the Indian owner on some of these lands. If the state has any such right, lessees are bound to take such charge into account in making contracts with the Government. The result is a heavy burden directly imposed on the operations of the Government.

If the opinion of the court in *Choctaw* v. *Harrison*, 235 U. S. 292, intimates coal at the pit may be taxed, we submit the reasons given for the conclusion in the Gillespie case by the same court will not sustain such a tax and it is controlling but we insist in our humble judgment the Supreme Court did not so infer in using the language at page 298 as follows:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. *McCulloch* v. *Maryland*, 4 Wheat. 316, 425; *Farmers Bank* v. *Minnesota* 232 U. S. 516. But it is *insisted* that the statute rightly understood prescribed only an *ad valorem* imposition on the personal property owned by appellant—the coal at the pit's mouth—which is permissible according to many opinions of this court."

The court merely states the point urged by the state in support of the validity of the gross production tax and names the cases cited as authority therefor. These same cases are discussed in the Gillespie opinion and the court says they are inapplicable.

We submit that a consideration of the whole of the opinion justifies the statement that the court in *Choctaw*

v. *Harrison* was only reciting points urged by the state.

The regulations of the Secretary of the Interior promulgated pursuant to the authority of the leasing statute of June 7, 1897, *supra,* provide:

> "All sums due as bonus or royalty or otherwise, shall be a lien on all implements, tools, movable machinery and all other personal chattels used in operating said property, *and also upon all the unsold minerals obtained and severed from the land* herein leased *as security* for the payment of said sum."

We are confident that the court will not conclude the state may exercise a power, unlimited necessarily, that will lessen the security obtained by the National Government for its wards. *If we concede the power it extends even to confiscation.* In that event the principle is recognized, that one sovereignty may tax another sovereignty out of existence.

It cannot be questioned now that the Supreme Court of the United States in *Large Oil Co.* v. *Howard supra,* has finally decided the Oklahoma Gross Revenue Tax of 1916 is invalid, and this, because it burdens the operations of the Government. The same court in the Gillespie case held the state can not tax the net income. The step from this to the invalidity of the tax on ore in bins is not long, and we submit is certain. This is the last word of the court. The tax on net income is much more remote than a tax on gross ore in bins from which net income is extracted.

II.

The lease and lessee, being a federal instrumentality determined by the national government as the means of carrying out its obligations to Quapaw Indians, are not taxable by the state. The fruit of said lease, be it termed interest, income, or product (net or gross) is likewise in every respect exempt from any tax burden sought to be imposed by the state.

Fortunately this question is fully settled in *Gillespie* v. *State, supra.* The court there states the rule plainly:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void, (*Pollock* v. *Farmers L. & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 158 U. S. 601). A rule lately illustrated by *Evans* v. *Gore*, 253 U. S. 245, 64 L. Ed. 887."

We have attempted to show that net income is received after ores are sold. There can be no logical reason assigned for holding net profits non-taxable because they are the fruit of a non-taxable source and withholding such exemption from the direct product from which the net income is realized.

In *Pollock* v. *Farmers L. & T. Co., supra,* the court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. * * * It is the substance and not the form which controls."

No authority other than the Gillespie case should be required to sustain our second proposition. The state concedes tax exemption to the lease. The net income and the product from which income is realized carries the same exemption.

Since the case of *Pollock* v. *Farmer's Loan & Trust Co., supra,* it has no longer been open to question, but that a tax upon income is a tax upon the principal from which such income is derived. Mr. Chief Justice Field in his opinion in the Pollock case (157 U. S. at page 591), says:

> "It must be conceded that whatever affects any element that gives an article its value, in the eyes of the law, affects the article itself."

Conclusion.

We confidently assert that it is clearly established:

First. These leases are governmental instrumentalities chosen by the National Government as a means of carrying out its obligations and policy toward these Indians; that, as such, no tax or burden fixed by the state which affects the subject-matter, however inconsequential or remote, is authorized and is beyond the power of the state.

Second. The effect of any burden in the nature of a tax must be considered in the light of its effect if applied to the extreme limit of taxing power—confiscation.

Third. The sole question here is, could the tax in question, if levied to the limit "hamper the operations of the Government," and not whether the property sought

to be taxed be real or personal, tangible or intangible, nor the tax be in character license or *ad valorem*.

Fourth. The source (lease) being exempt from tax, the income, gross or net, in the bin or marketed, carries the same protection.

Fifth. There is stronger reason for extending the exemption to *ad valorem* tax on ores in bin than can be offered for claim of exemption on net income.

Sixth. It is the effect of a tax, and not its form or name, that determines whether it burdens a federal agency.

For these reasons we believe the judgment should be reversed.

Respectfully submitted,

A. Scott Thompson,
Miami, Oklahoma,
Attorney for Petitioner and Plaintiff in Error.

A. C. Wallace,
Vern E. Thompson,
Ray McNaughton,
All of Miami, Okla.,
Of Counsel.

APPENDIX.

For the convenience of the court, we are quoting in part Section 9814 of the Compiled Statutes of the State of Oklahoma of the year 1921, under which the tax complained of herein is sought to be assessed.

> "Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D., 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced less the royalty interest, and equal to three per centum of the gross value of the production of

petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act. * * *

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described: but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxation for any subsequent year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time * * *."

In the Supreme Court of the United States. Jaybird Mining Company, a corporation, Petitioner, vs. Joe Weir, County Treasurer of Ottawa County, Oklahoma, Respondent.

Notice of Respondent.

To the above named respondent and his attorneys and counsel:

Take notice that at the opening of the Supreme Court of the United States on Monday, the ..... day of ....., 1925, at Washington, D. C., the petition for writ of certiorari to the Supreme Court of the State of Oklahoma in the cause and suit of Joe Weir, as Treasurer of Ottawa County, Oklahoma, plaintiff in error, against Jaybird Mining Company, a corporation, defendant in error, lately pending in said Supreme Court of Oklahoma, will be submitted to the Supreme Court of the United States, and that in support of said petition a brief will also be then presented to said court.

Copy of said petition for certiorari and brief in support thereof are herewith presented to you, this .... day of ....., 1925.

A. Scott Thompson,
Attorney and Counsel for Petitioner.

Service of above notice acknowledged this ..... day of ....., 1925.

.....

.....

Attorneys and Counsel for Respondent.

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IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, DEFENDANT
IN ERROR.

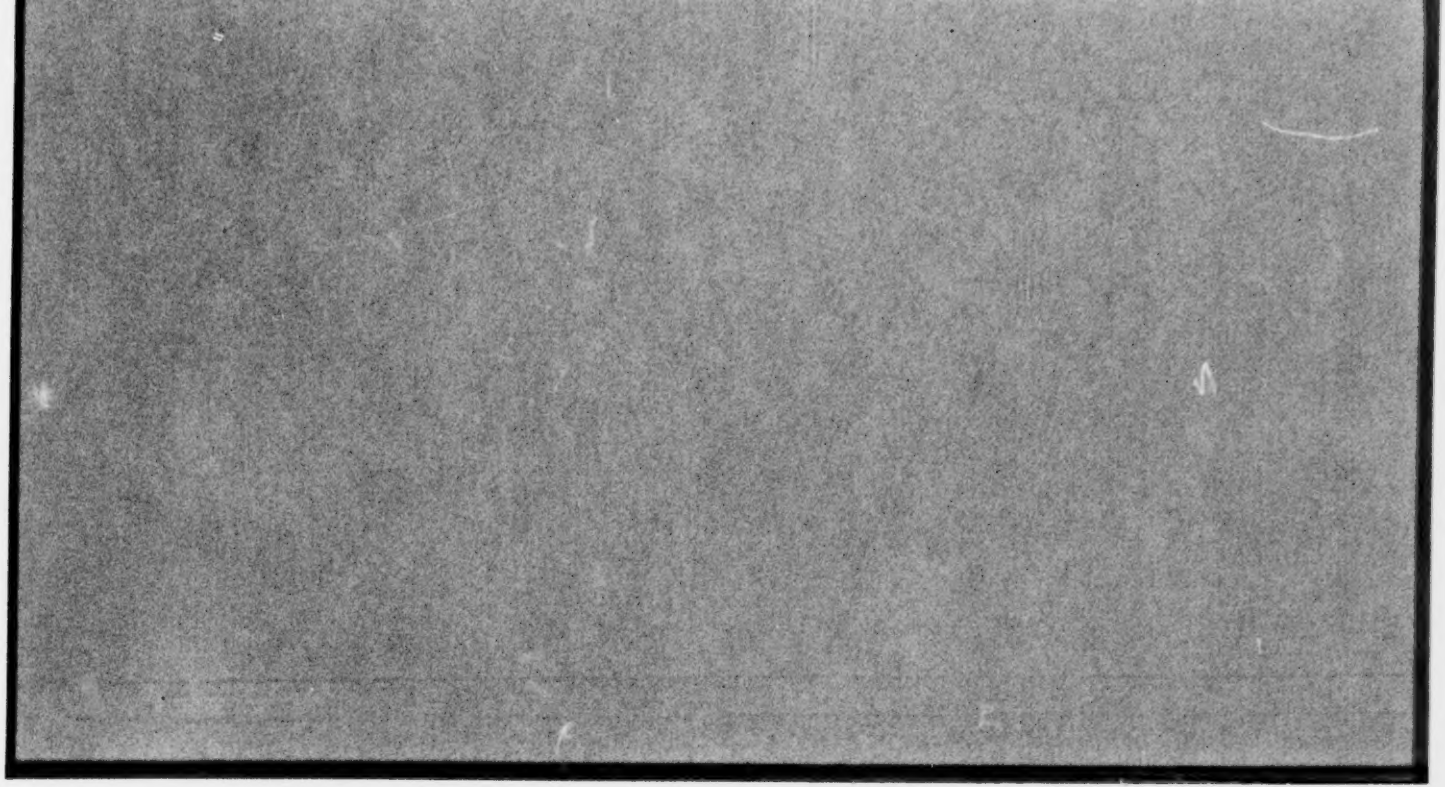
JAYBIRD MINING COMPANY, A CORPORATION,
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, RESPONDENT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

A. L. COMMONS,
JOHN H. VENABLE,
WM. M. THOMAS,
all of Miami, Oklahoma,
Attorneys for Defendant in Error.



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No. 929.

IN THE

Supreme Court of the United States

JAYBIRD MINING COMPANY, A CORPORATION,
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VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
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JAYBIRD MINING COMPANY, A CORPORATION,
PETITIONER,

VS.

JOE WEIR, COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA, RESPONDENT.

STATEMENT.

The able counsel for the plaintiff in error in this cause has made a rather full statement of the record in this case, and we desire to emphasize the fact only that this lawsuit was begun by the petitioner in the District Court of Ottawa County, Oklahoma, to recover about $2300.00 from the Treasurer of Ottawa County, which it had paid to the treasurer of said county in taxes, assessed and levied against lead and zinc ore in the bins

at the mine of said plaintiff in error on the first day of the taxing period of the State of Oklahoma, which assessment of said ore so found in the bins petitioner alleged was an illegal assessment and levy, for the reason the mine was located on a restricted Quapaw Indian allotment and that the mining company was operating under a lease executed by the Secretary of the Interior, and that said mining company was a federal agency and instrumentality. No copy of the lease was attached to the petition filed herein, and there is no record showing the details of the terms of such lease.

We desire to impress on this court the fact that the question involved in this case is one of grave importance and deserves the grave and deep consideration of all concerned. The authority of the state to tax lead and zinc ore as of the first day of the taxing period, found in the possession of the defendant in error, the Jay Bird Mining Company, however long it may have lain in the bins after it has been extracted from the earth, is questioned, if such lead and zinc ore has been mined from lands belonging to a restricted Quapaw Indian by a corporation, *organized* and engaged in the business of mining generally under and by virtue of the laws of the State of Oklahoma, and in this particular case operating under a lease obtained from the Secretary of the Interior; it would seem also to involve the power of the state to tax coal at the pits mouth; the stone taken from the quarry; oil in storage tanks, where such property has been taken from restricted Indian

lands under departmental leases. The question is still further reaching in that it would challenge the power of the state to tax the corn in the crib; the wheat in the granary; cotton in the bale; broomcorn in the warehouse, and in fact any and all crops taken from restricted Indian lands under departmental leases. It would question the power of the state to tax lumber sawed from timber cut from restricted Indian land, under contracts with the Secretary of the Interior. It would withdraw from taxation the greatest sources of wealth in the State of Oklahoma, without in any way benefiting the Indian.

Power of Taxation.

The power to tax is inherent in the state, and such power extends to all kinds of property which has its situs within the sovereignty of the state, except such property as is exempt, either by some constitutional provision or legislative enactment; that if the legislative authority exempts any property from taxation it is a matter of grace, and not an account of the merits of the property.

Section 9574 of Compiled Statutes of Oklahoma, 1921, provides:

> "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

This includes all property found in the State of Oklahoma on the first day of January of each year belonging to persons and corporations. There are a number of exceptions but among such exceptions we fail to find ore while on the other hand we find that the following Section 9814, of Compiled Laws of Oklahoma, 1921, provides specifically for the taxation of ore found in the bin, to-wit:

> "The payment of taxes herein (meaning gross production tax) imposed shall be in full and in lieu of all taxes by state, counties, cities, etc. * * * but any interest in land other than that herein enumerated, and OIL IN STORAGE, ASPHALT AND ORES bearing minerals heretofore named, mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxation for subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Thus it will be seen that the statutes of the State of Oklahoma, provide specifically for the taxation of the property in controversy in this case.

Governmental Instrumentality.

It seems that the petitioner herein relies solely on the proposition that a governmental instrumentality is involved in this case; that the Jay Bird Mining Company, an Oklahoma corporation, by reason of a lease which it obtained from the Secretary of the Interior on restricted Quapaw Indian land becomes a governmental

instrumentality, and that to require it to pay taxes on its tangible property would burden such instrumentality and violate a vital part of the Constitution of the United States.

What is a governmental instrumentality or agency, which seems to be used to mean one and the same thing? Is a mill or concentrating plant for separating lead and zinc ores from the dirt or rock a governmental instrumentality? Does it consist of so much timber, machinery, brick, mortar, concrete or granite or does it mean lease contracts giving the mining company the right to take lead and zinc ore from the Indian lands? Would any one say that the brick or stone building and the furniture of a national bank is a governmental instrumentality? Or would they say that the charter, the national bank notes, its drafts and other paper issued by such banks are governmental instrumentalities? To ask the question is to answer it.

We contend that the right to tax the lead and zinc ore in controversy rests on the following principles:

I.

That all property whether tangible or intangible over which the sovereignty of the state extends is subject to taxation by the state and that the sovereignty of the state extends over the class of property involved in this suit.

II.

That no tangible property is ever exempt from taxation without there is some constitutional or statutory provision specifically exempting such property from taxation; that such property is never exempt from taxation by implication.

I.

We believe that the able counsel for the plaintiff in error herein has misconstrued the definitions or principles laid down by the Great Chief Justice Marshall in *McCullough* v. *Maryland*, 4 Wheat. 466, 4 L. Ed. 579, when he said as a basis for his decision in that most famous case:

> 1. "All subjects over which the sovereign power of the state extends are objects of taxation; but those over which the state does not extend are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident."
>
> 2. "The sovereignty of the state extends to everything which exists by its authority, or is introduced by its permission."

Sovereignty.

It is the claim of the Jaybird Mining Company that it is a governmental instrumentality. If the test that was applied in the case of *McCullough* v. *Maryland*, *supra*, by Chief Justice Marshall be invoked, it is easy to see that the mining company, as shown by the pleadings herein, is a creature of the State of Oklahoma, while in the case, *McCullough* v. *Maryland*, it was a

bank of the United States involved, created by an Act of Congress exercising its authority under the Constitution of the United States. Even so, were we trying to tax the notes, drafts, checks and other paper that might be issued by one of the more modern national banking institutions, a Federal Reserve Bank or War Finance Corporation or Federal Farm Loan Bank.

On the other hand the state would have the right to tax any of the corporations, including mining corporations, state banks or any other of the hundred or more of various kinds of corporations, and require such corporations to pay a tax or license and on failure to do so could revoke the charter of such organizations. It could require a state bank to pay a revenue on any paper that it might issue just as the State of Maryland was seeking to make the National Bank of the United States to place a stamp on its paper before it could circulate the same.

The United States Government has nothing to do with the organization of the mining company involved in this case. All the interest it has is to collect the royalties after the lead and zinc ore has been sold or its value ascertained—not in kind but in money. And on failure of the mining company to comply with its lease, the Government may bring suit for the Indian for the royalty, and for a failure to operate the mine in the manner provided, may forfeit the lease existing between the mining company and the Government. The state can tax even the operation of the mining company

where it is operating on land other than restricted Indian land and the Government could as easily say you are placing a burden on an instrumentality. The state could tax the profits arising from leases on mining lands other than restricted Indian lands, and could tax the royalties derived from such source.

II.

No tangible property is ever exempt from taxation without there is some constitutional or statutory provision specifically exempting such property from taxation; that such property is never exempt from taxation by implication.

We do not want to be understood as contending that the lease held by the Jaybird Mining Company, the profits it may derive from the operation of the mine on restricted Indian land or on any royalties it might obtain from any lessee on such lands, nor that the state has a right to tax the royalties received by the Indian, for all of these would be a direct burden on the lease, which is a governmentality, and this court has already passed on these questions in the negative instrumentality. *What we are attempting in this case is to require a visible, tangible and very valuable class of property found with the great mass of the property of the state to bear its just burden of ad valorem taxation along with other property of the state of the same class, and all other tangible property.*

In *Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, this court held that the value of a depart-

mental lease held by said company could not be considered by the State Board of Equalization in determining the value of the properties of said company as a public utility or public service concern.

In *Gillespie* v. *Oklahoma*, 259 U. S. 501, 66 L. Ed. 338, this court held that the royalty interest could not be taxed as a part of the income of Gillespie, who held royalty interest in restricted Indian oil leases. These holdings have been followed in other cases. But no case has been passed on by this court where there was specific tangible property involved.

In *Shaffer* v. *Carter*, 252 U. S. 37, 64 L. Ed. 445, this court held that the gross production tax was intended as a substitute for the *ad valorem* property tax. And in this case the income tax was sustained because the gross production tax was a substitute for the *ad valorem* property tax. The Supreme Court of Oklahoma held that the gross production tax was a property tax in *In re Skelton Lead & Zinc Co.'s Gross Production Tax of* 1919, 197 Pac. 497. There are many cases in which this court has made a similar holding and we deem it unnecessary to cite such cases as this court is familiar with them.

There is a clear distinction between the agents or means used by the government in carrying out its governmental policies and the property of such agencies.

If the right of the State of Oklahoma to tax all subjects which come under the sovereignty of the state,

In *Thomson* v. *Union Pac. Ry. Co.*, the court said:

> "It is true that some of the reasoning in the case of *McCullough* v. *Maryland*, seems to favor the broad doctrine, but the decision itself it limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises to the Government of the United States."

See also *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 56 L. Ed. 801.

Mr. Justice Shiras in *Thomas* v. *Gay*, 169 U. S. 264, 42 L. Ed. 740, in which it was held that a tax on cattle grazing on Indian lands belonging to Osage Indians in Oklahoma, under authority of an Act of Congress authorizing the same was too remote and indirect to be termed a tax on the land, said:

> "The taxes in question here were not imposed on Indians, but on cattle as property of lessees, and as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on the leases so held by the owner of the cattle, and is too remote and indirect to be regarded as an interference with the legislative powers of Congress."

In *Union Pac. Ry. Co.* v. *Peniston*, 18 Wall. 5; 21 L. Ed. 787, the railroad was chartered by an Act of Congress and large grants of land were made for the railroad with provision that such railroad was to transport mail, soldiers' supplies, and it was also provided that the Government might appoint five of the directors of said road; that under certain contingencies, the Government might take possession of the road and all

its properties and operate it. The suit was brought over the right of the State of Nebraska to impose an *ad valorem* tax on the property of the road. It was admitted that the company was an agent of the Government. This court, in that case, speaking through Mr. Justice Strong said:

> *"It may therefore be CONSIDERED SETTLED THAT NO CONSTITUTIONAL IMPLICATION PROHIBITS A STATE TAX UPON THE PROPERTY OF AN AGENT OF THE GOVERNMENT, merely because it is the property of such agent. A contrary doctrine would greatly embarrass the states in the collection of the necessary revenue without any corresponding advantage to the United States."*

In *Central Pac. R. R. Co.* v. *California*, 162 U. S. 91, 40 L. Ed. 903, this court affirmed and emphasized the same doctrine on practically the same facts with the last case cited. The court speaking through Chief Justice Fuller, said:

> *"It may be regarded as generally settled that although corporations may be agents of the United States, but the property is not the property of the United States, but the property of the agents, subject to limitations laid down in Union Pac. R. R. Co.* v. *Penniston, supra. Van Brocklin* v. *Anderson*, 117 U. S. 29 L. Ed. 845."

The case of *Elder* v. *Wood*, 208 U. S. 226, 52 L. Ed. 464, holds that a gross production tax upon mining claims from the Government was taxable.

See also *Forbes* v. *Gracy, supra*, in which case the legislature of the State of Nevada passed an act pro-

viding a "NET PROCEEDS TAX" ON MINERALS AND ORES OBTAINED FROM GOVERNMENT LAND UNDER MINING RIGHTS OBTAINED FROM THE GOVERNMENT, and this court upheld the legality of the tax so laid on such minerals and ores, and in that case the court said:

> "The moment this ore becomes detached from the soil in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine, and extracted the ore or other mineral product. It is then *free from any lien, claim or title of the United States, and is rightfully subject to taxation by the state, as any other personal property is.*
>
> *The truth of this proposition is too obvious to need or admit of illustration or elaboration* * * *"

In *Utah & N. W. Ry. Co.* v. *Fisher*, 116 U. S. 28, 29 L. Ed. 542, it was held that the lands and railroad of the railway company, within the limits of Foothill Indian Reservation, in the Territory of Idaho, was lawfully subject to territorial taxation. See also *Maricopa & Pac. Ry. Co.* v. *Arizona*, 156 U. S. 347; 36 L. Ed 447.

In *Wagoner* v. *Evans*, 104 U. S. 588; 42 L Ed 1154, the same question was decided by this court, arising in Canadian County, Oklahoma, wherein cattle was on Indian lands under a departmental lease as in *Thomas* v. *Gay*, *supra*, and this court held that the cattle was taxable for the reason the burden, if any, was too

remote and indirect. See also *Montana Catholic Mission* v. *Missoulli County Assessor,* 200 U. S. 118; 50 L. Ed. 398.

We could continue indefinitely to cite cases and authorities on this question but we deem it unnecessary, but we should like to advert to one case in which the able counsel for plaintiff in error has seemingly failed to understand an *obiter dicta* expression of this court in the case of *Choctaw, O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292; 59 L. Ed. 234. This court in that opinion speaking of the Oklahoma Gross Production Tax Law of 1907-8, which provided for such a tax *IN ADDITION TO* AN AD VALOREM TAX held that such a tax because of its being in addition to ad valorem tax was intended for and in fact was a license or privilege tax, and of course rightly held that it was illegal. But in the course of the discussion of the tax made the following statement, which, we think, was guarded:

> "But it is insisted that the statute, rightly understood, prescribed only ad valorem imposition on personal property owned by appellant—the coal at the pits mouth—which is permissible, according to many opinions of this court."

And citing the following authorities:

> *Thomson* v. *Union Pac. R. Co., supra.*
> *Union Pac. R. Co.* v. *Penniston, supra.*
> *Central Pac. R. Co.* v. *California,* 162 U. S. 91, 40 L. Ed. 903.
> *Thomas* v. *Gay,* 169 U. S. 264, 42 L. Ed. 740.

The expression, *"Which is permissible, according to many opinions of this court,"* is the phraseology that is in question. We believe that no citations would have been made, if the court was quoting the counsel for the appellee in that cause.

This is the only expression of this court on the question involved in this case, that is exactly in point and that expression seems to be in line with all the decisions of this court where the question of taxation of the tangible property of any agent that may be performing services for the Government.

In case of *Gillespie* v. *Oklahoma*, 257 U. S. 501; 56 L. Ed. 388, the same principle was laid down however by this court, in passing on the right of Oklahoma to lay a tax on royalty, when the court took the precaution to say:

> *"Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases as those here."*

This leaves an implication that, if Gillespie had received his royalty in the form of oil in the storage tanks, that such oil so taken from land and placed in such tanks, could be taxed on an ad valorem basis. The status of such property would be exactly the same as ore in the bins in this case. Profits as contemplated by the Oklahoma Income Tax Law is indefinite and intangible and very uncertain, so much so that no one except the person whose income is in question can know what the value of it is, for the reason that it is net

profits that is taxable. You cannot see or feel such property, and no physical possession of it can be had, if indeed it could be deemed property. On the other hand if the oil is taken from the earth and placed in storage tanks, it becomes the subject of theft and arson and the courts of the state would have jurisdiction over such property, while the SOVEREIGNTY OF THE GOVERNMENT would not extend over it and the Government would be powerless to punish for the larceny or arson of such property. It is the tangible personal property of the owner, and no government except the state government could protect the owner of such property in this rightful possession of the property.

We believe that a mistaken idea has arisen in the minds of counsel for plaintiff in error herein as to what is tangible property and what is not. A lease is not tangible property or property at all according to the primary meaning of the word. It is a representation of value, and although after it has become operative and afterward lost and the paper cannot be found, yet the owner of the lease would still have his rights in the property leased and the courts would uphold his rights, even as against the Government. If an oral lease or other contract concerning Indian lands was authorized by Congressional action, and the appellant had entered into such a lease with the Department of the Interior, he would have rights just as valuable as if the same had been reduced to writing. Any kind of paper, whether lease, promissory note, deed or paper issued by national banks are only representation of value. Value is legis-

lated or contracted into such paper, but they have no intrinsic value and are not property in the true sense of the word. They may be the *MEANS OR INSTRUMENTS* used by the Government in carrying out its policy and cannot be taxed.

The Real Test.

After reading the brief of able counsel for plaintiff in error in this case we are led to believe that they rely on the fact that the *TAX IS A BURDEN* for the *RULE* to govern this court in its decision in this case. We admit that it is a burden to pay taxes for the protection of the laws of the state and nation, but a careful reading of the authorities shows that no rule for taxation can be deduced because of that fact. In *McCullough* v. *Maryland*, the court took pains to distinguish between the right of the State of Maryland to tax the operation of the bank and the paper issued by the bank under the Act of Congress creating the bank, and the tangible property of the bank, when he said *that the state could tax the property held by the bank in common with all other property of the state although it might be burdensome.* This can in no sense be considered an interference with the operation of an instrumentality of the Government. The state has the right to tax the building in which a national bank has its domicile and convey the title to it. It could sell the furniture of the bank to enforce the payment of taxes.

Chief Justice Marshall in the McCullough case also said that the *stock held by the stockholders of the bank was also taxable.* Now, if the rule is founded on the fact that the *TAXES ARE A BURDEN* and thus deduce a rule founded on that, when then would you say that the ore could be taxed? We should like to know

when the authorities would be warranted in levying a tax on such property. Would you say that such property could be held in the bins for years; that it could be sold by the operator; or that its form could be changed and still the property be not taxable? In other words suppose that this concentrating plant where the ore is separated from the rock was connected with a smelter and by that stood also a roller mill where the zinc slab would be made into sheet zinc, ready for use on buildings or other purposes, still a tax on it would be *burdensome*. Would you say that the ore could be taxed after it has passed into the hands of third parties by sale or barter? If you say it is, then you depart from a rule you seek to establish and which is founded on the proposition that the tax is *BURDENSOME*. Such a rule would be absolutely unsound.

We maintain that Chief Justice Marshall in the case of *McCullough* v. *Maryland, supra,* has given the rule which should govern in all cases where the questions like the one in the case at bar has arisen. If the corporation is a creature of the state, then the state has the right to cause such corporation, whether operating a lease on a restricted Indian allotment under a departmental lease or on unrestricted land, to perform certain conditions before it can do business in the state and can force such to pay a license tax or a property tax, as a prerequisite to doing business in the state, but could not require the payment of a license to mine under a departmental lease; nor a tax on the lease or profits arising under the lease or on the royalty that it may receive on such a lease. On the other hand, if the corporation is a creature of an Act of Congress, as are national banks, reserve banks or other Federal corporations, the state cannot require such a license or tax as a prerequisite to do business in the

state, but may tax its tangible property. Then the right to tax may rest on *SOVEREIGNTY* as defined by Chief Justice Marshall.

The test as to whether or not TANGIBLE PROPERTY CAN BE TAXED BY THE STATE DEPENDS ON WHETHER THERE IS ANY CONSTITUTIONAL OR STATUTORY PROVISION EXEMPTING SUCH PROPERTY FROM TAXATION. SUCH PROPERTY IS NEVER EXEMPT BY IMPLICATION.

Conclusion.

We submit that after a review of the leading cases on the subject involved in this action, we are unable to find any reason why the property in question herein should escape taxation, for when the ore is taken from the land, there is no connection whatever with the property and the restricted Indian land. We therefore ask that the writ of error in this case be denied and that on final hearing that this court affirm the decision of the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 293.—October Term, 1925.

Jaybird Mining Company, Plaintiff in Error, *vs.* Joe Weir, as County Treasurer of Ottawa County, Oklahoma.	In Error to the Supreme Court of the State of Oklahoma.

[June 7, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

The mining company sued in the District Court of Ottawa County to recover a tax of $2,319.80 paid under protest. The County Treasurer demurred to the petition asserting that it failed to state a cause of action. The demurrer was overruled, and judgment was given for the plaintiff. On appeal to the highest court of the State the judgment was reversed. 104 Okla. 271. The case is here on writ of error. § 237, Judicial Code.

Briefly the facts are these. September 26, 1896, pursuant to the Act of March 2, 1895, c. 188, 28 Stat. 876, 907, there was issued to Hum-bah-wat-tah Quapaw, a Quapaw Indian, a patent for an allotment of 40 acres of land in Ottawa County. The patent contained restrictions against alienation for 25 years, and by the Act of March 3, 1921, c. 119, 41 Stat. 1225, 1248, that period was extended for an additional 25 years. The land is owned by the heirs of the allottee. The company has a mining lease on the restricted land on terms which provide for the payment of royalties or a percentage of the gross proceeds derived from the sale of ores mined. The amount sued for is an *ad valorem* tax assessed by the county officials under § 9814, Compiled Statutes of 1921, on lead and zinc ores mined by the company in 1920, and which were in its bins on the land January 1, 1921. This tax is in addition to a gross production tax paid to the State Auditor. It was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated. Prior to the pro-

duction of the ores taxed, the Secretary of the Interior determined the Indian owners to be incapable of managing their property and assumed control of it in their behalf. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. Since that time, the royalties have been paid directly to the Secretary.

The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the Acts referred to. It is the duty and established policy of the government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. *United States* v. *Noble*, 237 U. S. 74; *Goodrum* v. *Buffalo*, 162 Fed. 817. The lessee is an agency or instrumentality employed by the government for the development and use of the restricted land and to mine ores therefrom for the benefit of its Indian wards. *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292. It is elementary that the federal government in all its activities is independent of state control. This rule is broadly applied. And, without congressional consent, no federal agency or instrumentality can be taxed by state authority. "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316." *Johnson* v. *Maryland*, 254 U. S. 51, 55. And see *Farmers Bank* v. *Minnesota*, 232 U. S. 516; *Choctaw & Gulf R. R.* v. *Harrison, supra; Gillespie* v. *Oklahoma*, 257 U. S. 501, 505.

This court has considered a number of cases quite like the one now before us. In *Choctaw & Gulf R. R.* v. *Harrison, supra*, there was an agreement by the United States that coal lands belonging in common to the members of the Choctaw and Chickasaw tribes should be mined, and that the royalties should be used for the Indians. The State imposed a tax equal to two per centum on the gross receipts from the total production of coal from the mine. It was held that it was an occupation or privilege tax, and that one having a mining lease made in furtherance of the governmental purpose could not be subjected to that burden. In *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, it was held that oil leases of land made by the Osage tribe were under the protection of the federal government, and that the State could not tax such leases either directly or as represented by the capital stock of the corporation owning them. It was said (p. 530): "A tax upon the leases

is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, . . ." In *Howard* v. *The Oil Companies*, 247 U. S. 503, this court affirmed, *per curiam*, the judgment of the United States District Court for the Western District of Oklahoma enjoining the enforcement of a tax imposed by the State on the gross value of the production of oil and gas, less the royalty interest, under leases upon Osage lands made for the benefit of the Indians. In *Large Oil Co.* v. *Howard*, 248 U. S. 549, this court reversed, *per curiam*, the judgment of the supreme court of Oklahoma (63 Okla. 143) sustaining a tax on gross value of production of petroleum and gas, less the royalty interest, where the owner of the property sought to be taxed was engaged under the authority of the Secretary of the Interior in the production of oil and gas in what formerly constituted the tribal lands of the Osage Nation. And in *Gillespie* v. *Oklahoma, supra*, it was held that the net income derived by a lessee from the sale of his share of the oil and gas received under leases of restricted Creek and Osage lands could not be taxed by the State. In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians.

In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The *ad valorem* tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the federal government within the principle of the cases cited.

From abundance of caution the company presented a petition for a writ of certiorari; but, as a writ of error lies, the petition will be denied. *Gillespie* v. *Oklahoma, supra*, 506.

Judgment reversed.

Mr. Justice McReynolds is of opinion that the effect of the assailed tax upon the instrumentality of the United States is remote and tax is valid under the doctrine approved in *Central Pac. R. R.* v. *California*, 162 U. S. 91, 119.

SUPREME COURT OF THE UNITED STATES.

No. 293.—October Term, 1925.

Jaybird Mining Company, Plaintiff in Error, *vs.* Joe Weir.	In Error to the Supreme Court of Oklahoma.

[June 7, 1926.]

Mr. Justice Brandeis, dissenting.

The property taxed is lead and zinc ore in bins. The land from which the ore was extracted belongs to a Quapaw allottee under the Act of March 2, 1895, c. 188, 28 Stat. 876, 907. Restrictions on alienation of the land will not expire until 1946. Act of March 3, 1921, c. 119, § 26, 41 Stat. 1225, 1248. But the allottee may lease the land for mining and business purposes for ten years unless he is incompetent, in which case the power to lease is vested in the Secretary of the Interior. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. The ore in question had been detached from the soil and is personal property. It is owned wholly by the Mining Company, a private Oklahoma corporation organized for profit. The ore is assessed under the general laws of the State which lays an *ad valorem* property tax on all property, real or personal, not exempt by law from taxation. Payment of the tax will not affect the financial return to the Indian under the lease. No state legislation exempts this property. There is no specific or general provision in any act of Congress which purports to do so. If an exemption exists, it arises directly from the Federal Constitution. Does ownership by an incompetent Indian of the land from which the ore was taken or ownership of the ore by an instrumentality of the Government create an exemption?

Is the ore exempt because it has been extracted out of restricted lands? The Quapaw might have conducted the mining operations

himself. If he had been competent he might, without the approval of the Secretary of the Interior have leased the land to others for mining purposes for a period of ten years. If he had operated the mine himself, I see no ground on which it could be held that his ore in the bins would not have been taxable to him, like any other unrestricted property to which he had absolute title.[1] The fact that he was incompetent does not render such property exempt from taxation.[2] Such incompetency results simply in the imposition of restrictions upon the alienation of his realty, exempting that from taxation. *The Kansas Indians*, 5 Wall. 737. But such restrictions cannot by implication be deemed to extend to personalty, even though the product of the realty, so as to exempt them from taxation. Compare *McCurdy* v. *United States*, 246 U. S. 263; *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Ransom*, 284 Fed. 108. Any exemption that attached to the land is limited thereto and does not extend to the ore extracted therefrom. *Forbes* v. *Gracey*, 94 U. S. 762, 765-766. Compare *South Utah Mines* v. *Beaver County*, 262 U. S. 325.

Is the ore exempt because it is the property of an agency employed by the Government for the benefit of the Indian, its ward? We are not dealing here with property owned by the United States as in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, or *Lee* v. *Osceola, etc., Improvement District*, 268 U. S. 643; nor with an agency all of whose property was acquired and is used solely for the purpose of serving the Government as in *Clallam County* v. *United States*, 263 U. S. 341. We are dealing with a private "corporation having its own purposes as well as those of the United States and interested in profit on its own account," *ibid*, p. 345. And we are dealing with a property tax, as distinguished from an occupation tax. *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Harrison*, 235 U. S. 292; *Oklahoma* v. *Texas*, 266 U. S. 298, 301. Whether, under the circumstances, Congress had power to exempt the ore from the general property tax, we need not consider. It has not done so in terms; and I see no reason for assuming that it intended to do so. Compare

[1]Pennock *v.* Commissioners, 103 U. S. 44; Goudy *v.* Meath, 203 U. S. 146.

[2]Keokuk *v.* Ulam, 4 Okla. 5. The exemption granted the personalty of the Indians in United States *v.* Rickerts, 188 U. S. 432, and in United States *v.* Pearson, 231 Fed. 270, rested upon the express ground that title to the property was held by the United States in trust for the Indians.

Mid-Northern Oil Co. v. *Montana*, 268 U. S. 45, 49; *Thompson* v. *Kentucky*, 209 U. S. 340; *Swarts* v. *Hamer*, 194 U. S. 441.

In 1873 this Court said: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent." *Railroad Co.* v. *Peniston*, 18 Wall. 5, 33. The rule there applied with respect to a railroad incorporated under a federal charter has since been followed as to other federal instrumentalities also. *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Mackey*, 256 U. S. 531, 537. Compare *Thompson* v. *Pacific Railroad*, 9 Wall. 579; *National Bank* v. *Commonwealth*, 9 Wall. 353, 362. It has been specifically applied to agencies, such as this mining company, whose employment was in aid of the Government's policy of protecting and developing the properties of its Indian wards. *Thomas* v. *Gay*, 169 U. S. 264; *Wagoner* v. *Evans*, 170 U. S. 588; *Catholic Missions* v. *Missoula County*, 200 U. S. 118. Those decisions seem to me controlling in the case at bar.

The rule that the property of a privately owned government agency is not exempt from state taxation rests fundamentally upon the principle that such a tax has only a remote relation to the capacity of such agencies efficiently to serve the Government.[3] Such a tax, as distinguished from an occupation or privilege tax, does not impose a charge upon the privilege of acting as a govern-

[3] "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers." Railroad Co. *v.* Peniston, 18 Wall. 5, 36. See T. R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 Harvard Law Rev. 321, 327; J. H. Cohen and K. Dayton, "Federal Taxation of State Activities and State Taxation of Federal Activities," 34 Yale Law Journ. 807.

ment agent and thereby enable a State to control the power of the Federal Government to employ agents and the power of persons to accept such employment. The tax is levied as a charge by the State for rendering services relating to the protection of the property, which services are rendered alike to agents of the Government and of private persons. Such a tax cannot be deemed to be capable of deterring the entry of persons as agents into the employ of the Government. Conceivably an operating company might pay a higher royalty or bonus if it were assured that it would enjoy immunity from taxation for the small quantity of the year's output of the mine which might be in the ore bins on the day as of which property is assessed. Conceivably also, the cattle owner in *Thomas* v. *Gay, supra,* might have paid higher for the grazing rights if the cattle while on the reservation were immune from taxation. But, in either case, the effect of the immunity, if any, upon the Indian's financial return would be remote and indirect. If we are to regard realities we should treat it as negligible.

The difference in the legal effect of acts which are remote causes and of those which are proximate pervades the law. The power of a State to tax property and its lack of power to tax the occupation in which it is used exist in other connections. In *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382, where the State had levied a tax upon property conveyed by the United States to the Shipbuilding Company on the condition that it construct a dry dock there for the use of the United States and that, if such dry dock were not kept in repair, the property should revert to the United States, this Court said: "But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

I suspect that my brethren would agree with me in sustaining this tax on ore in the bins but for *Gillespie* v. *Oklahoma,* 257 U. S. 501. The question there involved was different. Any language in the opinion which may seem apposite to the case at bar, should be disregarded as inconsistent with the earlier decisions. It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to

end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen. The attitude of the Court in this respect has been especially helpful when called upon to adjust the respective powers of the States and the Nation in the field of taxation.[4]

[4]See Sonneborn Bros. *v.* Cureton, 262 U. S. 506, qualifying Texas Co. *v.* Brown, 258 U. S. 466; Bowman *v.* Continental Oil Co., 256 U. S. 642; Askren *v.* Continental Oil Co., 252 U. S. 444, Standard Oil Co. *v.* Graves, 249 U. S. 389; also Galveston, Harrisburg & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217, 226, qualifying Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217; Leloup *v.* Port of Mobile, 127 U. S. 640, 647, qualifying Osborne *v.* Mobile, 16 Wall. 479; Philadelphia S. S. Co. *v.* Pennsylvania, 122 U. S. 326, qualifying State Tax on Railway Gross Receipts, 15 Wall. 284; Mercantile Bank *v.* New York, 121 U. S. 138, 147, qualifying Boyer *v.* Boyer, 113 U. S. 689; Railway Co. *v.* McShane, 22 Wall. 444, qualifying Railway Co. *v.* Prescott, 16 Wall. 603. Compare First Nat'l Bank of Guthrie Center *v.* Anderson, 269 U. S. 341, 348, explaining Merchants' National Bank *v.* Richmond, 256 U. S. 635; Texas Transportation & Terminal Co. *v.* New Orleans, 264 U. S. 150, and Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 296, limiting Fecklin *v.* Shelby County Taxing District, 145 U. S. 1; Baltimore & Ohio Southwestern R. R. Co. *v.* Settle, 260 U. S. 166, 173, qualifying Gulf, Colorado & Santa Fe Ry. Co. *v.* Texas, 204 U. S. 403.